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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1862

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York,

Petitioner,

vs.

ALBANY WELFARE RIGHTS ORGANIZATION and CATHERINE BODDIE, Individually and on behalf of her minor children and all other persons similarly situated,

Respondents,

and

FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services: GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York,
Petitioner,

vs.

ALBANY WELFARE RIGHTS ORGANIZATION and CATHERINE BODDIE, Individually and on behalf of her minor children and all other persons similarly situated,
Respondents,

and

FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services: GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Wyman prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 14, 1974 and amended by that Court by its order of April 11, 1974, which reversed, in part, the judgment of the United States District Court for the Northern District of New York, entered February 12, 1973.

Opinions Below

The "Memorandum-Decision and Order" of the District Court dated February 9, 1973, dismissing the complaint and denying a request for preliminary injunction is not reported. It is set forth as Appendix "A" to this petition.

The opinion of the Court of Appeals dated March 14, 1974 reversed the District Court's dismissal of the fifth cause of action of the complaint and remanded the case to the District Court with direction to grant a preliminary injunction in conformity with the opinion. The opinion of the Court of Appeals is not reported as yet. It is set forth as Appendix "B" to this petition.

Jurisdiction

Judgment in the Court of Appeals was entered on March 14, 1974.

A petition for rehearing[1] was duly filed with the Court on behalf of Commissioner Wyman.[2] In the petition for rehearing filed on behalf of the State Commissioner, it was contended (1) that the Court erroneously grounded its

[1] The County officers also petitioned for rehearing.

[2] George K. Wyman, Commissioner of Social Services of the State of New York has been succeeded in office and function by Abe Lavine.

jurisdictional finding of State action upon a "permissive order of the State Commissioner to County Officials" since the complaint alleged only a "policy" and the complaint did not allege any act of the State Commissioner of Social Services and was, therefore, as to him, insufficient to support jurisdiction in an action authorized by 42 U.S.C. § 1983 as implemented by 28 U.S.C. § 1343(3), and (2) that the Court had erroneously named as parties to the appeal all of the plaintiffs below since only Albany Welfare Rights Organization (A.W.R.O.) and Catherine Boddie had appealed. In its order of April 11, 1974, the Court of Appeals denied the petition as to the first ground set forth but granted the petition to name as parties appellants in that Court only the Albany Welfare Rights Organization[3] and Catherine Boddie, denominated on the title page of this petition as respondents.[4] The order of the Court of Appeals dated April 11, 1974 is set forth as Appendix "C".

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).[5]

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[3] Referred to hereinafter as A.W.R.O.

[4] Respondent Schreck and those listed with him on the title page were appellees in the Court below.

[5] While the judgment which we seek to have reviewed is not a final judgment granting or denying relief, it does finally determine an important issue in the case, namely the right of the Albany Welfare Rights Organization to conduct leafletting and organizing activities in the waiting room of the Albany County Department of Social Services.

Questions Presented

1. Where the complaint alleged that "[u]pon information and belief, it is now and has been since about June 1970, the policy of the New York State Department of Social Services to permit local welfare commissioners absolute discretion to allow or refuse local welfare rights organizations to exercise First Amendment rights in the waiting rooms or public areas of local social services departments", can it be said that such allegation is sufficient, as to petitioner, to allege "State Action" within the jurisdictional requirements of the Civil Rights Act so as to make petitioner subject to the jurisdiction of the Court?

2. Is a waiting room in the office of a County Department of Social Services a proper place for representatives of a welfare rights organization to enter for the purpose of distributing leaflets and conducting organizing activities?

In the event that this petition is granted, petitioner respectfully requests the right to argue the further questions, *i.e.*, (1) whether A.W.R.O. and Boddie, its then leader, have standing to assert the First Amendment rights of (a) A.W.R.O., an unincorporated association, and (b) its members and (2) whether A.W.R.O., as an unincorporated association, is a "citizen * * * or other person" within the meaning of 42 U.S.C. § 1983. *Cf. Moffat Tunnel League* v. *U.S.*, 289 U.S. 113 (1933), Rule 17(b) of the Federal Rules of Civil Procedure as amended, and *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Provision of the Constitution of the United States Involved

Amendment I.

> "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 602(a)(9), 45 Code of Federal Regulations, § 205.50, New York State Social Services Law § 136 and Part 357 of the Regulations of the New York State Department of Social Services are set out as Appendix "E".

Statement of the Case

In June of 1971, the Albany Welfare Rights Organization, Catherine Boddie and others filed a multi-faceted complaint in the United States District Court for the Northern District of New York seeking declaratory and injunctive relief and damages. Named as defendants were George K. Wyman, individually and as Commissioner of Social Services for the State of New York, the Albany County Commissioner of Social Services, the Albany County Deputy Commissioner of Social Services and two other county employees. The summons and complaint were served on June 17, 1971 with an order to show cause for a temporary restraining order and preliminary injunction dated June 16, 1971 and returnable before District Judge FOLEY June 21, 1971 at 10:00 a. m.

The complaint alleged jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4) and 42 U.S.C. § 1983 and generally was concerned (1) with the administration of public assistance in Albany County, (2) efforts of A.W.R.O. and Catherine Boddie to meet with County officials on a regular basis to discuss specific complaints of persons receiving

public assistance, and (3) efforts of A.W.R.O. and Boddie to disseminate welfare rights information and to organize welfare recipients on the premises of the Albany County Department of Social Services. United States District Judge FOLEY, in his "Memorandum-Decision and Order" of February 9, 1973, dismissed the entire complaint. A.W.R.O. and Boddie then appealed to the United States Court of Appeals from the dismissal of only the second, fourth and fifth causes of action set forth in the complaint. The second cause of action was based upon alleged violation of the Social Security Act and Regulations, the fourth cause of action was a constitutional claim relating to denial of equal protection of law, while the fifth cause of action related to claims under the First and Fourteenth Amendments.[6] The fifth cause of action, dismissed by the District Court, was reinstated by the Court of Appeals.

The only substantive issue pursued by respondents in the Court of Appeals and considered by that Court was the right of a welfare rights group and its representatives under the First Amendment to distribute leaflets and engage in conversation with welfare recipients in the

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[6] Respondents' fifth cause of action is here set out:

"FOR A FIFTH CAUSE OF ACTION, PLAINTIFFS ALLEGE:

1. Plaintiffs repeat and reallege each and every allegation contained in p[a]ragraph VI of this complaint with the same force and effect as though the same were fully set forth at length herein.

2. That the First Amendment to the United States Constitution guarantees to plaintiffs the following rights: freedom of speech; the right to peaceably assemble; the right to associate and to organize; and the right to petition government for the redress of grievances.

3. As a result of the foregoing, plaintiffs A.W.R.O. and Boddie have been and continue to be deprived by the defendant [*sic*] Wyman, Schreck, Jay and their agents, servants and employees of their rights to freedom of speech, the right to assemble, to organize, and to petition for redress of grievances in violation of the First and Fourteenth Amendments to the United State [*sic*] Constitution."

waiting areas of a welfare center and that is the only substantive issue presented here for consideration by this Court.

Petitioner State Commissioner of Social Services moved to dismiss the complaint (1) for failure to state a claim against defendant upon which relief can be granted, (2) lack of subject matter jurisdiction, (3) lack of jurisdiction of the person of defendant and (4) lack of standing on the part of A.W.R.O. to maintain the action. The County defendants moved to dismiss for failure "to set forth a cause of action or to state a claim against the defendants upon which relief can be granted". Such motions were returnable June 21, 1971.

Since the motion to dismiss tested the legal sufficiency of the allegations of the complaint, the allegations of Part VI, thereof entitled "FACTUAL ALLEGATIONS PERTAINING TO THE CLAIMS OF PLAINTIFFS A.W.R.O. AND BODDIE", upon which the fifth cause of action was grounded, are set out in Appendix "D".

Judge FOLEY denied the application for a temporary restraining order. A hearing on the motion for preliminary injunction was held before him on June 26 and 27, 1972. On February 9, 1973, Judge FOLEY granted the motions to dismiss.

Judge FOLEY took into account the evidence adduced at the hearing on the preliminary injunction, as well as his visit to the premises of the Albany County social services office (consented to by all parties) in reaching his decision. The State commissioner presented no testimony at such hearing. The testimony at that hearing related only to the dispute existing between respondents A.W.R.O., Boddie and the officials of the Albany County Department of Social Services.

The questions presented for this Court, *supra,* are questions of law. We, therefore, refrain from burdening the Court with extensive factual recitals concerning the dispute between A.W.R.O., Boddie and officials of the Albany County Department of Social Services.

While some leafletting and organizing activity was conducted by A.W.R.O. and its members from time to time on the premises of the Albany County Department of Social Services without permission, the basic and fundamental facts of the case are two in number. A.W.R.O. requested permission to conduct such activity and that request was denied by the County officials. While there was some evidence of disruptive activity by members of A.W.R.O., the Court of Appeals was of the opinion that such activity was not related to the request to conduct leafletting and organizing activity, and we do not contest that finding. Rather, we would argue the pure questions of law here involved.

District Court Judge FOLEY reviewed the testimony at the hearing on the preliminary injunction, and personally inspected the building, which he found to be "* * * adequate and well-maintained but sufficient only in its space requirements to accommodate partitioned work areas for large numbers of case workers and supervisors. The bench area for applicants and recipients is also adequate but just enough to fulfill the business purposes.", Judge FOLEY noted this in his opinion and then stated that:

> "Because of the closeness of the benches and the seating places, confusion it is evident could be engendered by two or three persons soliciting some as members, offering advice to some who might want to retain the important constitutional right to be 'let alone'. Privacy in my judgment is a major factor to be weighed in the setting we have here where many persons, who are

> paged by street address, may understandably be upset by being approached in the free manner requested by A.W.R.O. members. I find without hesitation such intrusion into a confined government building and department solely used for social services, with thousands of applicants and recipients serviced therein by 300 or 400 employees, that the prohibition of the distribution of leaflets and personal approach is reasonable limitation, justified and not violative of federal or state laws, or equal protection and free speech constitutional rights."

Judge FOLEY found "there is not a complete cut-off of entry and access of A.W.R.O. upon written request, and in fact one of the Deputy Commissioners goes to their location to listen to grievances."

Judge FOLEY held that A.W.R.O. lacked standing to bring the action under the Civil Rights Act since the complaint did not make out a claim of abridgment of right of association. He relied in part upon *Aguayo* v. *Richardson*, 473 F. 2d 1090 (2 Cir. [1973], certiorari denied ____ U. S. ____ [1974]). He also found that A.W.R.O. lacked standing to sue for violation of the rights of its members.

The Court of Appeals in its decision of March 14, 1974 held that A.W.R.O. had standing to bring the action because the refusal of access alleged involved an abridgment of the constitutional right of association (slip opinion, p. 2219).

The Court premised the requisite State action necessary to sustain a civil rights case upon a "permissive order of the State Commissioner to County officials"[7]

On the merits, the Court, while recognizing the right of the State to regulate the time and manner of solicitation

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[7] The complaint, however, alleged only a "policy".

generally in the interest of public safety, peace, comfort or convenience (slip opinion, p. 2221[8]) and the necessity of reasonable regulations to further significant governmental interests (slip opinion, p. 2224), considered the question of whether there is a compelling State interest in the total exclusion of A.W.R.O. representatives from the waiting rooms of the County welfare center (slip opinion, p. 2221) and found that the constitutional rights of A.W.R.O. and Boddie had been "impaired" (slip opinion, p. 2225).

The Court of Appeals held that it had jurisdiction under 28 U.S.C. § 1343(3).

The Court of Appeals reinstated the complaint so far as the constitutional free speech cause of action was concerned (the fifth cause of action) and held that at least one person should be permitted in one waiting room as the representative of A.W.R.O. with the privilege of distributing printed material and of conversing with willing welfare recipients.

The matter was remanded to the District Court with direction to grant the preliminary injunction and to determine the number of A.W.R.O. representatives, if more than one, to be given access "under reasonable conditions to provide a peaceful atmosphere for the conduct of official business" (slip opinion, p. 2225).

Petitioner has not applied for a stay of the mandate of the Court of Appeals, and while we lack information as to whether the mandate has been sent to the District Court, to our knowledge, the mandate has not been stayed.

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[8] The slip opinion pagination has been preserved in Appendix "B".

Reasons for Granting the Writ

We seek review of the judgment of the Court of Appeals on the grounds that:

(I) the Courts below lacked subject matter jurisdiction in this Civil Rights Action, at least as to the petitioner State Commissioner of Social Services, and

(II) this Court has not directly passed upon the important question of whether and to what extent leafletting and organizing activities may be conducted by welfare rights organizations on the premises of a local social services office and specifically in the waiting rooms of such offices where applicants and recipients of public assistance or services, whose identity is protected by law, are seated.

I.

The Court below erroneously grounded its jurisdictional finding of State action in respect to the exclusion of A.W.R.O. and Boddie from the premises of the Albany County Department of Social Services upon a "permissive order of the State Commissioner to County officials" because the complaint alleged only a "policy". The complaint does not allege any act of the State Commissioner of Social Services and is, as to him, insufficient to support jurisdiction in an action authorized by 42 U.S.C. § 1983 as implemented by 28 U.S.C. § 1343(3).

The Court below held: "Though no restrictive state statute is involved, the exclusion of the plaintiffs by the permissive *order* of the State Commissioner to County Officials constitutes State action." (Slip opinion, p. 2220).

(Emphasis added.) The finding of the existence of a "permissive order" suggests an imprimatur (an "act") by the State Commissioner which is not alleged in the complaint.

Since the Court below held that it had jurisdiction under 28 U.S.C. § 1343(3) (slip opinion, p. 2215), the finding of State action premised upon such an "order" is of critical importance to the decision ultimately reached by the Court, at least insofar as the same applies to the petitioner.

The complaint contains no allegation of the promulgation of such an order of the State Commissioner. Rather, it is alleged that:

> "On or about June 1970, defendant Wyman modified his policy with regard to the activities of welfare rights organizations in New York State. Upon information and belief, it is now and has been since about June 1970, the *policy* of the New York State Department of Social Services to permit local welfare commissioners *absolute discretion* to allow or refuse local welfare rights organizations to exercise First Amendment rights in the waiting rooms or public areas of local social services departments." (Emphasis supplied.)

Obviously, the mere allegation of such a "policy", without allegations of action, is sterile in the context of a Civil Rights Action.

Criteria applicable to Civil Rights actions were laid down by this Court in *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1969). The Court said (p. 150):

> "The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element

> requires that the plaintiff show that the defendant acted 'under color of law.'" (Footnote omitted.)
>
> "* * * the 'custom, or usage'" provisions "for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials" (398 U.S. 144 at 167).

The allegations of Part VI of the complaint (applicable to the fifth cause of action reinstated by the Court and set out as Appendix D) clearly show that the complaint fails to allege that petitioner State Commissioner of Social Services was involved through any act of his in the dispute between the Albany Welfare Rights Organization, Boddie and the County officers.

Indeed, it was for the Albany County welfare officials, in the exercise of their discretion, taking into account the high degree of peace and order necessary to the normal operation of a waiting room in a welfare office and the rights of applicants and recipients to privacy and confidentiality, to determine what, if any, activities were to be permitted by A.W.R.O. and Boddie on their premises. In the exercise of that discretion, no State action was required and no State "act" was involved. See *LeClair* v. *O'Neil*, 307 F. Supp. 621, at 624, 625 (D. Mass., 1969) affd. 401 U.S. 984 (1971). Compare *Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D.R.I., 1971) and *Indiana Consumers and Workers Union et al.* v. *Swaim*, Civil No. 72F5 (D.C. Ind., May 18, 1972 and July 12, 1972) (unreported).

The complaint in this action is totally deficient in terms of any "act" on the part of petitioner, is thus jurisdictionally defective and should have been dismissed, at least as to him.

II.

This case presents an important constitutional question, not heretofore decided by this Court.

This Court in *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966) said:

> "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason, there is no merit to the petitioner's argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however, and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on [*Cox* v. *Louisiana*, 379 U.S. 536, 554-55 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 563-64 (1965)]. We reject it again. The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose."

The question presented to the Court is the extent to which *Adderley* applies to leafletting and organizing activities in the waiting rooms of social services offices and whether and to what extent such activity is to be permitted in waiting rooms, if at all.

Prior to the case at bar there had been three Federal cases which dealt with welfare waiting rooms. These are *Hurley* v. *Hinckley*, 304 F. Supp. 704 (D.C. Mass., June 20, 1969), affd. *sub nom. Doyle* v. *O'Brien, Chief of Police*, 396 U.S. 277 (1970); *Massachusetts Welfare Rights Organization* v. *Ott*, 421 F. 2d 525 (1st Cir., 1969); *LeClair* v. *O'Neil*,

307 F. Supp. 621 (D.C. Mass., 1969), affd. 401 U.S. 984 (1971) without opinion, citing *Younger* v. *Harris*, 401 U.S. 37, and *Samuels* v. *Mackell* and *Fernandes* v. *Mackell*, 401 U.S. 66.

Of the above cases, only *Hurley* and *LeClair* reached this Court. The affirmance in *LeClair* specifically cited, as noted above, *Younger* v. *Harris*, *Samuels* v. *Mackell* and *Fernandes* v. *Mackell*, thus indicating that the Court was applying the doctrine that Federal courts should abstain from interfering with the enforcement of State law (in that case the Massechusetts disturbing the peace Statute) as articulated in *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943). As to *Hurley*, this Court simply affirmed. It seems reasonable, however, to assume that that affirmance was grounded upon the same abstention doctrine since in that case the Massachusetts Trespass Statute was involved.[9]

In *Hurley* v. *Hinckley*, *supra*, plaintiffs brought an action before a three-judge Federal Court to enjoin the enforcement of the Massachusetts Trespass Statute against them for their activities in a welfare office. *Hurley* actually consisted of two cases. The first was *Barnstable*, in which a substantial number of persons totally disrupted the functioning of the welfare office. The second case was "*Somerville*" where a single person, a member of a welfare rights organization, attempted to distribute leaflets relating to "welfare rights" in the waiting room of a welfare office.

In *Barnstable*, where disruption in the welfare office had occurred, the Court found that such conduct oversteps the bounds of protected freedoms of expression and petition (p. 710).

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[9] For a New York State case involving the application of a criminal trespass statute to presence in a welfare building see *People of the State of New York* v. *Wolf, et al.*, 63 Misc 2d 178 (District Ct., Suffolk County, 1970).

In *Somerville*, the Court said (pp. 711, 712):

> "The use to which the Somerville welfare office is dedicated by the State and the municipality in the furtherance of the public business is more restricted than the use members of the public may make of a public amphitheatre, terminal, public park, or sidewalk. Certainly the State need not permit every purported exercise of a First Amendment freedom to take place there. Plaintiff, however, was not publicizing a protest unconnected with the welfare office; what she did can be characterized as speech and conduct incidental to formulating a petition for redress of a grievance having its root in the functions of the welfare office and likely having a particular affect on most members of the general public who would visit that office. The merit, or lack of merit, of her petition for redress of grievance has nothing to do with the issue before the court."

In *Somerville*, the Court took cognizance of the fact that it had been unable to find any decision of this Court which would be controlling. The Court said:

> "No decision of the Supreme Court appears to directly control the situation presented here. We believe, however, that the First Amendment guarantees of speech and petition, as articulated and applied in cases such as *Brown* v. *Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (sit-in in public library), and *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (picketing on state house grounds), permit a strong argument to be made that plaintiff, in the circumstances described here, was upon public property 'with right' within the meaning of the trespass statute."

The *Hurley* Court did not decide the issue in *Somerville* which troubled it because it held the trespass statute to be constitutional.

Next came *Massachusetts Welfare Rights Organization* v. *Ott*, 421 F. 2d 525 (1st Cir., November 6, 1969), which

attacked State departmental welfare regulations suspending welfare services when an unusually large number of individuals entered a welfare office at the same time for the purpose of demonstrations, disturbance and sit in. Those regulations provided for the suspension of service to members of the group involved. The regulation contained a further provision for acceptance of demands made by such a group by the office head for consideration. In this context, the *Ott* Court stated (527):

> "Although there are differences between plaintiffs' cited cases and the one at bar, we will *assume* that plaintiffs have the demanded 'right to associate, [to speak] and petition at a welfare service office,' and go directly to the heart of the matter—what are the corresponding rights of the state authority that is conducting the legislatively prescribed business on the premises." (Footnote omitted.) (Emphasis supplied.)

The *Ott* Court's *assumption* of the plaintiffs' "rights" is understandable in view of the fact that the State had attempted to regulate the conduct involved. The Court in *Ott* upheld the State regulation.

The last case in the series is *LeClair* v. *O'Neil*, 307 F. Supp. 621 (D. Mass., December 23, 1969) affd. 401 U.S. 984 (1971) involving the Massachusetts "disturbing the peace" statute. *LeClair* was concerned with an attempt by a welfare rights organization to set up a folding card table in the waiting room of a welfare office. The court stated (p. 623):

> "The were not requested to leave, either before or after they set up the table, or to reduce their number, or to desist from assembling or organizing, to take down their signs or to stop distributing their circulars."

The Court passed *only* upon the question of whether the plaintiffs were entitled to maintain the table and concluded that they were not (p. 264):

The *LeClair* Court said (pp. 624, 625):

"Whatever First Amendment rights existed in the Welfare Office, they could not be exercised at the expense of the primary purpose the office was designed to serve.

"'Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State.' *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 1968, 391 U.S. 308, 320, 88 S. Ct. 1601, 1609, 20 L.Ed. 2d 603 (dictum). See Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773, 1776-77 (1967), *Cf. Adderley* v. *Florida*, 1966, 385 U.S. 39, 87 S.Ct. 242. 17 L.Ed. 2d 149; *Cox* v. *New Hampshire*, 1941, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049. *Reasonable latitude must be permitted to the persons in charge. Waiting rooms are not traditional forums of protest, and a high degree of peace and order is necessary to their normal operation. Cf.* Note, Regulation of Demonstrations, *supra*, at 1777.

"*Under these circumstances the only question is whether the welfare officials, in curtailing plaintiffs' activities, abused their discretion. Massachusetts Welfare Rights Organization* v. *Ott*, 1 Cir., 1969, 421 F.2d 525; *Wolin* v. *Port of New York Authority*, 2 Cir., 1968, 392 F.2d 83, cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275. We cannot say that it was unreasonable to object to the erection of a table within the waiting room. We distinguish the suggestion in *Wolin* that it may be a question of fact whether it is unreasonable to object to a table in a large terminal building. In the present case, quite apart from any question whether the particular location interfered with the privacy of applicants wishing to talk with employees in the inner office, we hold that it was within the discretion of the welfare officials to determine that a table occupied by non-applicants *unduly burdened the capacity of a room, necessarily of limited size*, provided for waiting applicants." (Emphasis supplied.)

Obviously, a waiting room in a welfare office is not the same as the terminal building maintained by the Port of New York Authority (*Wolin* v. *Port Authority of New York*, 392 F. 2d 83 [2d Cir., 1968] cert. den. 393 U.S. 940 [1968]); a public street (*Thornhill* v. *Alabama*, 310 U.S. 88 [1940]); or a shopping center (*Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 [1968] and *Lloyd Corp., Ltd.* v. *Tanner*, 407 U.S. 551 [1971]).

A waiting room in a welfare office is a special place intended to serve the most intimate needs of those who come there, *i.e.*, the supplying of financial assistance and services necessary to their very existence. While it is an office in a public building, we submit that the Court of Appeals was overly broad when it characterized a waiting room as a "public place, for all may enter who have business to transact" (slip opinion, p. 2222). Such a waiting room is "public" only in the very limited sense that any member of the general public who has legitimate business in the welfare office may come there to obtain assistance or services.

In a waiting room there exists a shield of confidentiality created by State and Federal law and regulation (set out in Appendix "E") that is intended to protect the identity of recipients of and applicants for public assistance. These are to be found in 42 U.S.C. § 602(a)(9) requiring safeguards restricting the use or disclosure of information concerning applicants and recipients of Aid to Families with Dependent Children, a regulation of the Federal Department of Health, Education and Welfare (45 C.F.R. § 205.50(a)(2)(i)(a)) requiring that the names and ad-

dresses[10] of applicants and recipients and amounts of assistance provided are to be safeguarded and *id.* section 205.50(a)(2)(i)(b) that information relating to the social and economic conditions or circumstances of a particular individual is to be safeguarded and its release restricted (*id.* section 205.50(a)(2)(ii)). Further confidentiality requirements are to be found in New York Social Services Law § 136 and regulations of the New York State Department of Social Services, 18 Official Compilation, Codes, Rules and Regulations, Part 357.

In none of the cases discussed does it appear that the question of confidentiality to which recipients and applicants are entitled was reached.

While the New York State Department of Social Services would caution local agencies not to permit anything to interfere with the local administration of the social serivees program beyond that caveat, it is for the local agency to permit reasonable leafletting and organizing activities at its discretion.[11]

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[10] The Court below disregarded the confidentiality argument other than to take cognizance of the fact that people were called from the waiting room by address rather than by name " to preserve anonymity" (slip opinion, p. 2217). Thus the Court did not reach the issues presented by the requirements of Federal and State law which protect the identity of recipients of public assistance.

[11] We are advised that in an action involving the Tompkins County Department of Social Services a stipulation was entered into permitting a representative of a welfare organization to quietly offer to act as a representative, advising, counseling and communicating with and distributing leaflets to applicants and recipients in the waiting room of the Tompkins County Department of Social Services at Ithaca, New York (*Tompkins County Welfare Rights Organization, et al.* v. *Boniface* (Northern District of New York) (No. 72-CV-129)). We understand also that in Onondaga County an arrangement was made with a local legal assistance office to permit their presence in the social services office in Syracuse, New York also after action had been commenced. The complaint alleged that similar activity was being conducted in the welfare offices of the City of New York.

Administration of the welfare program, however, includes, of necessity, the preservation of the confidential relationship created by statute and regulation and necessitated by an innate sense that confidentiality should be maintained. Thus, while petitioner respects the right of A.W.R.O. to peaceably conduct leafletting and organizing activities; that right must not be permitted to be exercised in those portions of the premises of a county social services office where it would interfere with the right of confidentiality of the persons who have come to the office to discuss matters relating to public assistance or services.

We submit that the waiting room in a welfare office is not a proper place for the conduct of such activities because people, by their very presence in the waiting room, are *identified* as applicants or recipients of public assistance or services.[12]

If a single person sitting in a waiting room in a welfare office is embarrassed by being approached by a representative of A.W.R.O., the law, we submit, affords that person protection against such embarrassment. It is not enough to say that such a person may simply reject communication from a representative of A.W.R.O. as the Court below suggests. That person, and those who feel as he does, is entitled to be left alone in the waiting room and to be free of intrusion upon his privacy by persons whom he does not know and who would broach him on intimate problems which most persons undoubtedly wish did not even exist.

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[12] If A.W.R.O. is to be given access, the injunction to that effect must be explicit in (1) setting out the number of representatives of A.W.R.O. who may have access at any one time and (2) regulating their conduct, as the judgment of the Court of Appeals would require.

The intrusion upon the privacy and invasion of the right of confidentiality to which those in the waiting room are entitled is further demonstrated by the fact that there was testimony before District Judge FOLEY which indicated that at least some of those who distributed leaflets and conducted organizing activities in the County social services office were not recipients of public assistance but were "supporters" of A.W.R.O.

The question presented by efforts of organizations to leaflet and conduct organizing activities in welfare waiting rooms is likely to arise elsewhere. It is, we submit, desirable that this Court finally resolve that question. Such action would enable social services officers to act with certainty and would provide the States with the assurance that action taken in conformity with the decision of the Court would amount to compliance with the Federal requirements herein cited.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: June 5, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

APPENDIX "A"

Memorandum-Decision and Order of the District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

ALBANY WELFARE RIGHTS ORGANIZATION; CATHERINE BODDIE, MARY BAILEY, MARY ALBEA, JACQUELINE CAPERS, ELLEN YVONNE CUNNINGHAM, SADIE MAE HARRIS, DELOIS HINTON, ELSIE JACKSON, NANCY JOHNSON, RENE OLIVER, WILLIE MAE ROBERTS, SHARON DENISE RUSSELL, BETTY MAE SINGLETERRY, ROY ANTHONY TIBBS, MARTHA LOUISE TIBBS, Individually and on behalf of their minor children and all other persons similarly situated; VIVIAN RUTH FULLARD, Individually and as mother and/or natural guardian of the minor children in her household and on behalf of all other persons similarly situated; HALLIE PURVIS; IRENE PURVIS, DORIS DEES, Individually and on behalf of all other persons similarly situated; and JODYE HOLMES, as the next friend of MICHAEL BOSTIC, ROSEMARY BOSTIC, ROBERT BOSTIC, LINDA BOSTIC, JIMMIE DEAN BOSTIC, RICHARD BOSTIC, and RICKY BOSTIC, minor children on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York; FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services; GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

Defendants.

71-CV-278.

Appendix "A"—Memorandum-Decision and Order of the District Court

Appearances:

Legal Aid Society of Albany, Inc., Attorney for Plaintiffs, 79 North Pearl Street, Albany, New York 12207.

Of Counsel:

Marilyn Joan Berger, Joel F. Spitzer.

Hon. John J. Clyne, Albany County Attorney (Now Albany County Judge), Attorney for Defendants: Francis Schreck, Anthony Jay and George Pipentacos, Albany County Court House, Albany, New York 12207.

Hon. Louis J. Lefkowitz, Attorney General of New York State, Attorney for Defendant: George K. Wyman, Capitol, Albany, New York 12224.

Of Counsel:

Joseph T. Hopkins, Douglas S. Dales, Jr., Assistant Attorneys General, James H. Sweeney, Deputy Asst. Attorney General.

MEMORANDUM-DECISION and ORDER.

JAMES T. FOLEY, *D.J.*

Very recently in the *City of New York, et al.* v. *Richardson, as Secretary of HEW of the U.S. et al.*, 2 Cir., ____F. 2d ____, Docket Nos. 72-1854, 72-2265-6-7, decided 1/26/73, Circuit Judge Kaufman described the claim therein as a sprawling, multi-party and multi-claim one. Such description is an apt description for the complaint in this action. It is unfortunate to so express such appraisal in reference to a pleading filed in behalf of a welfare organization and

named recipients of public assistance but the plain statement of claims in concise and direct terminology, required by the Federal Rules of Civil Procedure, is essential to be emphasized in order that an intelligent analysis of alleged constitutional and statutory violations can be made. (See *Jackson* v. *Hepinstall, et al.*, (NDNY), 328 F. Supp. 1104).

The complaint herein is 44 pages and is verified by Catherine Boddie, individually and as President of the Albany Welfare Rights Organization (A.W.R.O.) and each of the named plaintiffs. The complaint is set forth in Roman numeraled paragraphs and there are 36 pages regarding preliminary statement, jurisdiction, class action status, factual allegations concerning A.W.R.O. and its President, and factual allegations pertaining to the claims of all other plaintiffs before the First Cause of Action is set forth on page 37. There are five causes of action set forth in relatively brief form except that each repeat and re-allege each and every allegation contained in either the allegations of paragraph VI, or the substantial number of alleged incidents set forth in paragraph VII (pp. 13-36), involving problems with public assistance recipients of wide ranging variety in different years from 1961 through 1971, allegedly arising with employees and officials of the Albany County Department of Social Services. Each factual incident in this detailed paragraph VII concludes with the same charge that thereby the defendants, their agents, servants and employees violated and continue to violate the New York Social Services Law with regard to that particular plaintiff, and applying said law and regulations inequitably and non-uniformly.

Appendix "A"—Memorandum-Decision and Order of the District Court

To digest this enormous complaint as much as possible for others to follow: The First Cause of Action alleges violations of certain sections of the Social Security Act and federal regulations based upon these factual instances in regard to uniformity and equal treatment for public assistance recipients. The Second Cause of Action as best as I can relate it is directed against Commissioner Wyman's so-called "Open Door Policy" in behalf of plaintiffs A.W.R.O. and Catherine Boddie. To keep this analysis in some degree of order, this claim is based upon violations of stated provisions of the Social Security Act and regulations in that the discretionary policy that Commissioner Wyman grants to each County Social Services Department to allow, if it so determines, the entry of Welfare Rights Organization groups to disseminate information, conduct organizing activities, and seek redress of grievances on the premises of the local County Social Services Department. The Third Cause of Action alleges that the instances set forth in paragraph VII of the complaint deprives the individual plaintiffs of equal protection of the laws under the Fourteenth Amendment in that all persons in like situations are not being treated equally, and there are persons in New York State and the County of Albany who are receiving their full entitlement as prescribed in the New York State Social Services Law. This cause of action and claim is difficult to understand but the import must be in conclusory form as I view it that some persons receive full benefits while the named plaintiffs did not. The Fourth Cause of Action is a constitutional claim alleging that plaintiffs A.W.R.O. and Catherine Boddie by being denied access to the premises of the Albany County Department of Social Services have

been deprived of their equal protection rights by Commissioner Wyman, Commissioner Schreck, Deputy Commissioner Jay, and their employees. The Fifth Cause of Action is that this alleged denial of free access to the premises of the Albany County Department of Social Services violates the freedom of speech, right to assemble, to organize and to petition for redress of grievances in violation of the First and Fourteenth Amendments.

Plaintiffs seek a temporary restraining order, preliminary and permanent injunctions enjoining defendants from failing to comply with federal uniformity provisions, preventing A.W.R.O. from disseminating information in the Albany Social Services Department Building, being discourteous to recipients and failing and refusing to meet regularly with the A.W.R.O. and thus allow First Amendment rights in that regard. Mandatory injunctive relief is also sought for Defendants Wyman and Schreck to develop a plan that will allow A.W.R.O. to disseminate information in the lobby and waiting room, and to meet with A.W.R.O. and stop treating recipients of public assistance insultingly and discourteously. The complaint seeks $100,000.00 compensatory damages for the named plaintiffs, and the extraordinary demand for "an additional amount of $1,000,000.00 for punitive damages for the deprival of their rights, payable to the Albany Welfare Rights Organization, to provide them in perpetuity with funds sufficient to police the application of the New York State Social Welfare Law and Regulations by the Albany County Department of Social Services". (See *Adickes* v. *Kress & Co.*, 398 U.S. 144; *Green* v. *Wolf Corporation*, 2 Cir., 406 F. 2d 291).

Appendix "A"—Memorandum-Decision and Order of the District Court

Beneath this mass of verbiage in the complaint, and extensive briefing with two letter exhibits attached on the part of plaintiffs, the dominant issue involved simply put is the prohibition by the Albany County Social Services Welfare Department from distributing leaflets and recruiting members for its group upon the Albany premises of the Department located in the City of Albany. Hope springs eternal and for several months it was my thought an amicable arrangement could be made for the continuation of meetings between certain members of the A.W.R.O. that took place in the Department's building from June 1970 until January 1971. This relationship is shown by a series of letters marked Pl. Ex. 29, between the A.W.R.O. and Commissioner Schreck that were received in evidence at the hearing of the preliminary injunction request that was held July 26, 1972, after it became evident the discussion and negotiation policy in these type disputes recommended by Chief Judge Friendly in *Negron* v. *Wallace*, 2 Cir., 436 F. 2d 1139, would not repair the deterioration that had come about in the relationship between the A.W.R.O. and the Albany Social Service officials. There was not a complete breakdown of communications, but the flat rejection was made to allow groups, or any number of A.W.R.O. members, to enter the waiting room of the Albany Department building and pass out leaflets and talk to people waiting on benches to be processed by the Department's case workers, or other employees, and solicit them for membership in the A.W.R.O. or discuss with them problems concerning public assistance that certain of the recipients might be concerned with. The plaintiffs' exhibits introduced and received in evidence at the preliminary injunction hearing are listed

in the letter of the Legal Aid Society of Albany, dated August 18, 1972, and include diagrams of the First and Third Floors of the Albany County Social Services Building in Albany, and also photographs of the interior. These exhibits, as is our custom, shall be returned to the plaintiffs' attorneys, to be retained by them if and when needed for appeal purposes. A fair resume of the testimony at the hearing is contained in Defendant Wyman's Post-Hearing Brief which shall be filed with the Clerk. On September 14, 1972, I paid a personal visit and made an inspection tour of the waiting room and offices on the important First Floor areas of the Department. In the beginning of our conferences after the complaint was filed, Attorney Berger wanted ten or twelve in a group to have free access to the waiting room to distribute leaflets and solicit as members and advise waiting welfare applicants or recipients but the request at the end, I believe, dwindled to three A.W.R.O. members to be allowed this freedom of action on the First Floor.

The temporary restraining order was denied early but such denial was reaffirmed in a memorandum-decision and order dated January 13, 1972. The preliminary injunction hearing was of interest because we had a television display, without sound, of an incident between a group of persons who confronted the Albany County officials and the television picture, though soundless, proved the doctrine "that actions speak louder than words". There is no intent on my part to demean the worthy interest to get complete and full information to the applicants and recipients but the commotion and disturbance caused in a very busy office was proven by this confrontation, and by the admissions

that leaflet distribution was done inside the building and persons approached in the waiting room, and officials confronted by groups from the A.W.R.O. despite letters from the Commissioner that such activity was prohibited. Deputy Sheriffs and police officers had to be called on four or five occasions although it should be noted when these officers requested the intruding and uninvited groups, they left the building peaceably—without violence occurring or force used to any extent.

From my inspection of the building, I find it adequate and well-maintained but sufficient only in its space requirements to accommodate partitioned work areas for large numbers of case workers and supervisors. The bench area for applicants and recipients is also adequate but just enough to fulfill the business purposes. Because of the closeness of the benches and the seating places, confusion it is evident could be engendered by two or three persons soliciting some as members, offering advice to some who might want to retain the important constitutional right to be "let alone". Privacy in my judgment is a major factor to be weighed in the setting we have here where many persons, who are paged by street address, may understandably be upset by being approached in the free manner requested by A.W.R.O. members. I find without hesitation such intrusion into a confined government building and department solely used for social services, with thousands of applicants and recipients serviced therein by 300 or 400 employees, that the prohibition of the distribution of leaflets and personal approach is reasonable limitation, justified and not violative of federal or state laws, or equal protection and free speech constitutional rights. I find

significant distinctions in the conduct here described at the hearing from that described by Judge PETTINE in *Unemployed Workers Union, et al.* v. *Hackett* (D. R.I.), 332 F. Supp. 1372.

If the action were to be retained as containing meritorious civil rights claims, based upon the hearing and my formal visit, it would be my conclusion at this preliminary stage that the oft declared requirements of likelihood of success and irreparable harm have not been met. The plaintiffs in their quest for this drastic preliminary injunctive relief have the burden to demonstrate in those respects and have failed to do so in my judgment. (*Checker Motors Corp.* v. *Chrysler Corp.*, 2 Cir., 405 F. 2d 319, 323; cert. den. 394 U.S. 999; *Clairol Inc.* v. *Gillette Co.*, 2 Cir., 389 F. 2d 264, 265; *Canty* v. *Board of Education, City of New York* (SDNY), 312 F. Supp. 254). I find no irreparable harm here because the approximate twenty-five incidents set forth in the complaint out of admittedly thousands of cases within their own description show fair hearing procedures and resort to the courts which evidence that any alleged harm was repaired and that others would have the same sources to correct inequitable or unjust decision by particular case workers if so made. (See *Studebaker Corp.* v. *Gittlin*, 2 Cir., 360 F. 2d 692, 698). I would deny the motion for preliminary injunction.

More important, however, it is my conclusion that the separate motions in behalf of the defendants to dismiss the complaint for failure to state viable claims for relief must be granted. In the melange of assertions in the complaint, a substantial portion alleging injustice in certain

decisions concerning particular and varied problems, even when given the utmost credence, indicates personality clashes that exist in private and public everyday life or mistakes in judgment that as noted above there are correctable fair hearing procedures and court remedies that are open and available. I realize, of course, that the contention of the A.W.R.O. is that there may be uninformed, illiterate and uneducated people who may not be so aware, but public service is a public trust and the Supreme Court has assumed, and so do I, that the case worker possesses some qualifications and dedication to duty. (*Wyman* v. *James*, 400 U.S. 309, 318-19). Every responsible person, and this Court also, wants full information to flow to the needy and disadvantaged, but that does not mean free rein should be permitted to intrude upon the government's primary obligation to advise and inform such persons.

In this complaint, the statutory claims, at least, in my opinion, are used as bootstraps to elevate the constitutional claims to merit, and the constitutional claims to establish the statutory ones as proper pendent claims to the constitutional ones.

A formidable and impenetrable legal barrier, I think, exists to the constitutional claims put forth by A.W.R.O. and its President. The Court of Appeals, Second Circuit, has ruled very recently in *Aguayo et al.* v. *Upstate Welfare Rights Organization*, 2 Cir., ____ F. 2d ____, Docket Nos. 72-2195, 72-2243, decided 1/18/73, that unless there is ascertainable assertion of a claim of abridgement of right of association, welfare organizations have no standing under the civil rights statute, 42 U.S.C. 1983 and its jurisdictional

implementation, 28 U.S.C. 1343(3). It was held the wording of the statutes does not suggest an organization may sue for the violation of rights of members. (See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538; *National Welfare Rights Organization* v. *Wyman* (EDNY), 304 F. Supp. 1346, 1348; *Crossen* v. *Breckenridge*, 6 Cir., 446 F. 2d 833, 839). It has been further held that a district court does not have jurisdiction to reach pendent statutory claims if no substantial constitutional claim is presented. (*Hagans* v. *Wyman*, 2 Cir., ____ F. 2d ____, Docket No. 72-2175, decided 1/3/73.

Despite these legal barriers, that some may think hypertechnical, there are other reasons that make the allegations of the complaint dismissible upon their face. It is hornbook law that exercise of First Amendment rights on streets and sidewalks cannot be interfered with broadly and absolutely. (*Hague* v. *C.I.O.*, 307 U.S. 496, 515-16). In fact, it was testified at the hearing before me that the A.W.R.O. was given unrestricted use of the sidewalk outside the Albany Social Services Building with right to have a table thereon to distribute pamphlets and solicit members. It should also be noted that nowhere in this lengthy complaint, briefing and testimony, is there any intimation at all of racial discrimination in the public assistance disputes and the members of A.W.R.O. in conferring or attempting to confer with the Albany Department officials or employees. But, as emphasized in *Massachusetts Welfare Rights Organization* v. *Ott*, 1 Cir., 421 F. 2d 525, 527, affirming Judge JULIAN in 299 F. Supp. 296, who dismissed a complaint of this kind for failure to raise a substantial

federal question, a welfare office is not to be equated with a public street and the Department (Social Services) had every right to have its employees make decisions free from pressure and coercion. First Amendment is not a license to impede or disrupt the orderly performance of an essential function of government, *Adderly* v. *Florida*, 385 U.S. 39, 47-48, and reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, and are permitted. (*Grayned* v. *City of Rockford*, 408 U.S. 104, 115). In the situation here, there is not a complete cut-off of entry and access of A.W.R.O. upon written request, and in fact one of the Deputy Commissioners goes to their location to listen to grievances.

In any event, after careful examination of this voluminous complaint, it is my firm conviction that it does not present by its complex arrangement and detailed wording viable claims under 42 U.S.C. 1983 and 28 U.S.C. 1343(3). (See *Albany Welfare Rights Org. Day Care Ctr., Inc.* v. *Schreck, et al.*, 2 Cir., 463 F. 2d 620). It is essential for claims to be viable under the civil rights statutes that there are reasonably ascertainable claims that the defendants deprived plaintiffs of rights secured by the Constitution and laws of the U.S. under color of law. (*Adickes* v. *Kress & Co.*, 398 U.S. 144, 150). Invidious discrimination must be charged to amount to violation of the Equal Protection Clause. (*Dandridge* v. *Williams*, 397 U.S. 471, 487; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489; *Snowden* v. *Hughes*, 321 U.S. 1). The claim against Commissioner Wyman that by announcing an "open door policy" leaving discretion for the same to the local Commissioner violated

federal or state law in my judgment approaches the frivolous. Realizing fully that a complaint in the federal system must be upheld unless it appears to a certainty plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim (*Conley* v. *Gibson*, 355 U.S. 41, 47-48), there is in my mind that certainty to such extent that compels the dismissal of the complaint for the reasons stated herein.

The separate motions for dismissal of the entire complaint in five claims are granted. The claims for alleged federal and state statutory and regulation violations are dismissed for failure to state claims upon which relief can be granted, and the constitutional claims based upon the First and Fourteenth Amendments are dismissed for the reasons outlined herein and for lack of standing of the Albany Welfare Rights Organization to prosecute such constitutional claims for its members under the civil rights statutes referred to herein. The list of plaintiffs' exhibits set forth in the Legal Aid letter of August 18, 1972, shall be filed with the Clerk for record purposes, and the exhibits themselves shall be retained in my Chambers in Albany and are to be picked up by the Legal Aid representatives at their convenience.

It is so Ordered.

Dated: February 9, 1973, Albany, New York.

JAMES T. FOLEY
United States District Judge

APPENDIX "B"

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 210—September Term, 1973.
(Argued December 14, 1973 Decided March 14, 1974.)
Docket No. 73-1580.

ALBANY WELFARE RIGHTS ORGANIZATION; CATHERINE BODDIE, MARY BAILEY, MARY ALBEA, JACQUELINE CAPERS, ELLEN YVONNE CUNNINGHAM, SADIE MAE HARRIS, DELOIS HINTON, ELSIE JACKSON, NANCY JOHNSON, RENE OLIVER, WILLIE MAE ROBERTS, SHARON DENISE RUSSELL, BETTY MAE SINGLETERRY, ROY ANTHONY TIBBS, MARTHA LOUIS TIBBS, Individually and on behalf of their minor children and all other persons similarly situated; VIVIAN RUTH FULLARD, Individually and as mother and/or natural guardian of the minor children in her household and on behalf of all other persons similarly situated; HALLIE PURVIS, IRENE PURVIS, DORIS DEES, Individually and on behalf of all other persons similarly situated; and JODYE HOLMES, as the next friend of MICHAEL BOSTIC, ROSEMARY BOSTIC, ROBERT BOSTIC, LINDA BOSTIC, JIMMYE DEAN BOSTIC, RICHARD BOSTIC and RICKY BOSTIC, minor children on behalf of themselves and all other persons similarly situated,

Appellants,

against

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York; FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services; GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE

LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

Appellees.

Before: LUMBARD and MANSFIELD, *Circuit Judges*, and GURFEIN,* *District Judge*.

Appeal from an order entered in the United States District Court for the Northern District of New York, JAMES T. FOLEY, *Judge*, denying plaintiffs' motion for a preliminary injunction and dismissing the complaint which alleged denial of plaintiffs' rights to free access to waiting rooms of county welfare center, to assemble, to organize and to petition for redress of grievances in violation of the First and Fourteenth Amendments.

Reversed and remanded with respect to Fifth Cause of Action and denial of preliminary injunction.

Marvin N. Karpatkin, New York, N. Y., Joel F. Spitzer, Albany, N. Y. (Paul Lichterman, Albany, N. Y.; Paul G. Chevigny and Eve Cary, New York, N. Y., on the brief), for Appellants.

Alan W. Rubenstein and John J. Clyne, Albany, N. Y. (Louis J. Lefkowitz, Attorney General; Ruth Kessler Toch, Solicitor General, on the brief), for Appellees.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix "B"—Opinion of the Court of Appeals

GURFEIN, *D. J.*:

This is an appeal from an order of the District Court for the Northern District of New York, Judge FOLEY, entered on February 12, 1973, denying plaintiffs' motion for a preliminary injunction after a hearing and dismissing the complaint.

Plaintiffs are the Albany Welfare Rights Organization (AWRO) and individual members and welfare recipients. AWRO is a local chapter of the Upstate New York affiliate of the National Welfare Rights Organization, which has some 150,000 members in approximately 850 local organizations throughout all fifty states. At the time of the hearing below, AWRO had approximately 400 members. The organization's purpose is educational and political in that it seeks to inform welfare recipients of their legal rights, to train them to help other welfare recipients in their dealings with the Welfare Department, and to organize them to exert political pressure on behalf of poor people upon local, state, and federal governments.

The controversy in this case arose when the plaintiffs attempted to pass out informational leaflets to welfare recipients inside the County Welfare Center, and were forbidden to do so by the defendant Albany County Welfare officials, who relied upon discretion conferred upon them by the defendant State Commissioner. This appeal is from the District Court's orders under those claims for relief (Second, Fourth and Fifth) which relate directly to the exercise of the right of plaintiffs to distribute leaflets. The defendants are the State Commissioner of Social Services, the Albany County Commissioner, a deputy commissioner, the supervisor and a caseworker.

Jurisdiction is alleged under 28 U.S.C. §§ 1331 and 1343 (3) and (4). We hold that there is jurisdiction under Section 1343(3).

The second claim for relief is based upon alleged violation of the Social Security Act and regulations, in that the discretion vested by Commissioner Wyman in the County Social Services Departments to prohibit groups from disseminating information is discriminatory against the plaintiffs. The fourth claim is a constitutional claim alleging that denial to plaintiffs of access to the premises of the Albany County Department of Social Services deprives them of the equal protection of the laws. The fifth claim is that the denial of free access to the premises violates the rights of the plaintiffs to freedom of speech, and the right to assemble, to organize and to petition for redress of grievances in violation of the First and Fourth Amendments. Since we are constrained to reverse on the dismissal of the Fifth Claim, we need not consider the other claims raised.

The Albany County Social Services Department is located in a five story building in the City of Albany. All the work of the Department employees that involves personal contact with welfare recipients is carried out on the first and third floors, and there are waiting areas on these floors for recipients who come to the Center.[1] The Welfare Department has approximately 400 employees.

All county business is carried out behind partitions. Welfare recipients upon arriving at the building are referred to a particular waiting area depending on the nature of their business. There the recipient informs a secretary of his presence and takes a seat in the waiting area.

Every few minutes a welfare department employee comes to the front of the waiting area and shouts out the address

[1] It was stated on the oral argument that the waiting area on the first floor consists of 3300 square feet, and on the third floor, of 900 square feet. The District Court in its opinion refers to "the waiting room" in the singular, possibly because it deemed the larger waiting room as the only one requiring practical consideration.

of a waiting recipient (to preserve anonymity) and that person then enters the work area through a door to see a caseworker.

As of May 31, 1972, the welfare department had 6,600 cases involving some 20,000 persons. On any given day between 200 and 250 welfare recipients come to the welfare center concerning public assistance alone, excluding those who come for food stamps and medicaid. Most of these persons wait a minimum of an hour and a half before the case is called.

At the end of 1969, members of the Albany Welfare Rights Organization began to go down to the Welfare Center every Monday to meet with Welfare officials and to pass out leaflets to waiting welfare recipients. The leaflets contained legal information about the rights of welfare recipients in relation to the welfare department and information about AWRO and the welfare rights movement. AWRO members would also try to answer welfare recipients' questions about their legal rights or would tell them to come to the AWRO office for help with complicated problems that could not be answered on the spot. People who expressed an interest were encouraged to join the organization.

The weekly distribution of leaflets went on for approximately six months during which time AWRO membership grew heavily. In mid-1970, however, a new policy was instituted by the County Welfare Department, and AWRO members were told that they could not pass out their leaflets inside the welfare center. When told to stop they did so for that day without protest, but they continued to return to the center on a number of occasions and to pass out as many leaflets as they could until someone came to insist they leave. No arrests were ever made of persons distributing leaflets nor were police called at any time to disperse them.

At the hearing there was no testimony that, during the six months that AWRO members handed out leaflets in the welfare center, there was any disruption whatsoever caused by their activities. On the contrary, the testimony tended to establish that distributing leaflets was carried on only in public areas of the building which were separated from areas where county business was carried out. There were some incidents of disruption, but these related to the refusal of county officials to discuss grievances with AWRO, and were not related to distributing leaflets.

The appellees contend, so far as is relevant to this disposition, that (1) neither AWRO nor Boddie nor any of the other plaintiffs has standing to maintain the action; (2) the complaint does not state a constitutional claim against the State Commissioner; (3) subsidiary thereto, appellees contend that a waiting room in the office of a county social service department is not a proper place for a welfare organization to enter for the purpose of distributing leaflets and conducting organizing activities.

As Judge FRIENDLY observed in *Aguayo* v. *Richardson*, 473 F.2d 1090, 1098 (2 Cir. 1973), *cert. denied*, ____ U.S. ____, 42 U.S.L.W. 3406 (1974), welfare cases require the courts to "weave our way through a maze of problems relating to standing and jurisdiction." That is also true of cases asserting First Amendment rights brought by associations of people.

While a complaint by an association alleging that its members will be harmed by threatened conduct suffices to give the association standing under the general federal question statute, 28 U.S.C. § 1331, *Aguayo*, *supra*, 473 F.2d at 1099, that does not determine the $10,000 jurisdictional amount requirement. (*Id.* at n. 13) If we look to the standing of a welfare organization under the civil rights statute, 42 U.S.C. § 1983, and its jurisdictional implementation, 28 U.S.C. § 1343(3), this Court has held that such an

organization may not sue under the Civil Rights Act for the violation of rights of members. *Id.* at 1099-1100.

The District Judge, construing *Aguayo* to be applicable to the facts of this case, held that AWRO had no standing to raise the constitutional claims. We think that AWRO had standing to bring this complaint because the refusal of access alleged involved an abridgement of the constitutional right of association. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 428-29 (1963); *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296 (1961); *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 n.9 (1960); *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 US. 449, 458-60 (1958); see also *Smith* v. *Board of Education of Morrilton School District No. 32,* 365 F.2d 770 (8 Cir. 1966). There is sufficient evidence in the record to permit the conclusion that AWRO's efforts to increase its membership were adversely affected by its exclusion from the premises of the Albany County Welfare Department.

Judge Foley, with his customary patience, and in obedience to the suggestion in *Negron* v. *Wallace,* 436 F.2d 1139, 1141 (2 Cir.), *cert. denied,* 402 U.S. 998 (1971), tried to work out a compromise between the parties, but in Judge Foley's words, "the flat rejection was made to allow groups, or any number of A.W.R.O. members, to enter the waiting room of the Albany Department building and pass out leaflets and talk to people waiting on benches to be processed by the Department's case workers, or other employees and solicit them for membership in the A.W.R.O. or discuss with them problems concerning public assistance that certain of the recipients might be concerned with."

Upon the failure of the negotiations, the District Judge dismissed the complaint, thus sustaining the complete exclusion of AWRO representatives from "the waiting room." We think that a blanket and wholesale ban, in the circumstances, violates the rights of the plaintiff's under the First

Amendment as applied to the states under the Fourteenth, and that the decision below was erroneous. We paraphrase the language of Judge KAUFMAN in *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 85 (2 Cir.), *cert. denied*, 393 U.S. 940 (1968): "We hold that the [Albany County Welfare Dept.] may not abridge by absolute prohibition the right of political expression. The peaceful activities proposed by [AWRO] are protected against denial by the [Albany County Welfare Dept.], and accordingly, they may be restricted only by regulations narrowly drawn to serve legitimate interests of the general public who use the [County Welfare Center]."

The right of free speech is a fundamental right which is safeguarded against state interference by the due process clause of the Fourteenth Amendment. *DeJonge* v. *Oregon*, 299 U.S. 353, 364 (1937). Though no restrictive state statute is involved, the exclusion of the plaintiffs by the permissive order of the State Commissioner to County Officials constitutes State action. Peaceful distribution of leaflets is a form of communication protected by the First Amendment, and hence, by the Fourteenth. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Schneiber* v. *State*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938). As Chief Justice HUGHES said in *Lovell, supra*, "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. at 452.

Leaflets are, therefore, within the protection against prior restraint on their distribution, and such restraint constitutes an impermissible restraint under the Constitu-

tion, *Organization for a Better Austin, supra,* 402 U.S. at 418, and comes to the courts with a "heavy presumption" against its constitutional validity. *Id.* at 419. In the light of the "heavy presumption," there would have to be an extraordinary showing of an invasion of privacy to rebut the presumption. *Cf. Martin* v. *City of Struthers,* 319 U.S. 141 (1943).

The State is, of course, "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Cantwell* v. *Connecticut,* 310 U.S. 296, 306-07 (1940). See *Cox* v. *Louisiana,* 379 U.S. 536, 554 (1965). "But in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969).

We, thus, come to the question whether there is a compelling state interest in the *total* exclusion of the AWRO representatives from the waiting rooms of the County Welfare Center.

The appropriateness of the place for the exercise of the right of free speech and the furtherance of the right of free association as a preliminary to petitioning for redress of grievances turns to some extent "on the relevance of the premises to the protest." *Wolin, supra,* 392 F.2d at 90. Judge KAUFMAN noted in Wolin, that there were two ways to find that relevance, where the place represents the object of protest, and where the relevant audience may be found. *Id.*

Here we are not dealing with direct protests but rather with informational activity. In that regard the "relevant audience" factor is compelling. Prospective members of the AWRO and persons who need information about public assistance are best found in the waiting rooms of County Welfare Centers. And it is in that best place that

the restrictions on free speech have been imposed in this case.

We must recognize, of course, that the waiting rooms of welfare offices are not "streets, sidewalks, parks and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." See *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968). Nor do they, like bus terminals, so resemble public thoroughfares as to make them appropriate places for the exercise of First Amendment rights. See *Wolin, supra*. As the Court of Appeals for the First Circuit said in *Massachusetts Welfare Rights Organization* v. *Ott*, 421 F.2d 525, 527 n.4: "A welfare office is not to be equated with a public street." Obviously, the constitutional rights asserted may be the subject of regulations to protect the free flow of traffic and the conduct of the county's business.

On this record, however, we are not dealing with the incursion of a mass of people to coerce the public officials in the performance of their duties. There is no plea to be allowed to conduct sitdowns or disruptive meetings. The plea is a narrow one, that a limited number of AWRO representatives, three in number, be permitted to distribute informational literature and to talk to people while they are waiting to consult the county officials. It is in the light of these modest requests that we must consider whether the waiting room of a welfare office is an appropriate place for the exercise of these constitutional rights.

We think it is. The waiting room is a public place, for all may enter who have public business to transact. It is not a part of the premises which is screened off for the actual conduct of public business and the private interviewing of welfare recipients.

On the one hand, it is not an appropriate place for a picket line or demonstrations. In that sense, it is not a traditional forum of protest. *LeClair* v. *O'Neill*, 307 F. Supp. 621 (D.C. Mass. 1969), *aff'd*, 401 U.S. 984 (1971). On the other hand, a waiting room is a proper place for private conversation with those waiting to be served. Here we apply the distinction between the communication of ideas by conduct and the communication of ideas by pure speech. *Cox* v. *Louisiana*, *supra*, 379 U.S. at 555; *LeClair* v. *O'Neill*, *supra*. In that respect, we accept as a proper enunciation of relevant principle the conclusion of Judge Pettine in his well-reasoned opinion in *Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D.R.I. 1971), and the dictum of the three-judge court in *Hurley* v. *Hinckley*, 304 F. Supp. 704, 711-12 (D. Mass. 1969), *aff'd sub nom.*, *Doyle* v. *O'Brien*, 396 U.S. 277 (1970). See also *Indiana Consumers and Workers Union et al.* v. *Swaim*, Civ. No. 72F5 (D.C. Ind., July 12, 1972) (unreported).

The District Court found the "conduct" here significantly different from that described by Judge Pettine in *Unemployed Workers Union* v. *Hackett*, *supra*. We believe that in reaching that conclusion, however, the District Court wrongly considered evidence of earlier demonstrations or "confrontations" to be determinative of what we conceive to be an independent right to distribute pamphlets and to engage in peaceable free speech by a limited number of people.

While the engaging by plaintiffs in a series of legal and illegal episodes may at times justify a denial of a temporary injunction until conduct and speech can be sorted out one from the other, which we do not find to be the case here, that affords no basis for denying the right of speech itself by dismissal of the entire complaint. A permission to speak and, peaceably and in a reasonable manner, to distribute leaflets may not be denied as part of a blanket

refusal to permit demonstrations and confrontations which occur at the wrong time and place to the disruption of official business. Judge FOLEY was right, of course, in recognizing that reasonable regulations may be necessary to further significant governmental interests, see *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966); and *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972), but there is a difference between reasonable regulation and total prohibition.

The District Court also believed that privacy was a "major factor." We do not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights. We do not suggest that an AWRO representative would have the right to demand the name of a person on the waiting line if he chooses not to give it. But we cannot assume, on the other hand, that everyone on the waiting line would reject all communication with such representative. This is not an intrusion into the home, the church, or the voting booth. It involves simply talking to people who are waiting. Unless there is a showing that the listener has been badgered to the point of being made a captive, this intrusion on privacy in a public waiting room is slight against the heavy presumption in favor of free speech and assembly, which are preludes to the orderly redress of grievances. See *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952).

This court is mindful of, and stresses, the need for quiet and decorum in the conduct of the state's business. We do not tolerate pressures on caseworkers or administrative personnel any more than we would sanction pressures on judges or jurors. This appeal, however, does not involve protest. It involves the orderly distribution of information, without coercion, to welfare recipients. Any order issued may enjoin the making of excessive noise or engag-

ing in other disruptive activity. The work of the welfare department must go on without disturbance.

We hold, in substance, that, since the constitutional rights of the plaintiffs have been impaired, the complaint should be reinstated so far as the constitutional free speech claim is concerned. We hold that, at least one person[2] should be permitted in one waiting room as the representative of AWRO with the privilege of distributing printed material and of conversing with willing welfare recipients.

The District Court should determine, in conformity with this opinion, the number of AWRO representatives, if more than one, to be given access under reasonable conditions to provide a peaceful atmosphere for the conduct of official business.

Having reinstated the Fifth Claim of the complaint, we need not decide now whether the plaintiffs will be entitled to money damages upon a trial.

Dismissal of Fifth Claim of the Complaint reversed and remanded; order denying preliminary injunction reversed with direction to grant it in conformity with opinion.[3]

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[2] We have used the term "at least one person" for the reason that Judge Foley had indicated in his findings that two or three individuals might create a disruptive influence.

[3] The injunction may provide that the plaintiffs will remove all discarded material, and that the AWRO representatives clearly designate themselves in an appropriate matter as not being employees of the Albany County Welfare Department.

APPENDIX "C"

Order of Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy four.

Present: HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
Circuit Judges,
and
HON. MURRAY I. GURFEIN,
District Judge.

ALBANY WELFARE RIGHTS ORGANIZATION, *et al.*,
Appellants,

against

GEORGE K. WYMAN, *et al.*,
Appellees.

Docket No. 73-1580.

A petition for reargument having been filed by counsel for respondents,

Upon consideration thereof, it is hereby

Appendix "C"—Order of Court of Appeals on Petition for Rehearing

ORDERED, that the caption is amended to read as follows:

ALBANY WELFARE RIGHTS ORGANIZATION and CATHERINE BODDIE, Individually and on behalf of her minor children and all other persons similarly situated,

Appellants,

against

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York; FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services; GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

Appellees.

and it is further

ORDERED that the appearances are amended to read as follows:

Marvin N. Karpatkin, New York, N. Y., Joel F. Spitzer, Albany, N. Y. (Paul Lichterman, Albany, N. Y.; Paul G. Chevigny and Eve Cary, New York, N. Y., on the brief), for Appellants.

Alan W. Rubenstein (Louis J. Lefkowitz, Attorney General; Ruth Kessler Toch, Solicitor General, on the brief), for Appellee Wyman.

Condon A. Lyons, County Attorney for Albany (Robert E. Harris, of counsel) for Appellees Schreck and Jay.

and it is further

ORDERED that the text of the opinion is amended as follows:

Slip op. page 2215, line 25, after the words "this appeal" add "by Albany Welfare Rights Organization and Catherine Boddie."

In all other respects, the petition is denied.

J. EDWARD LUMBARD,
U. S. C. J.

WALTER R. MANSFIELD,
U. S. C. J.

MURRAY I. GURFEIN,
U. S. D. J.

APPENDIX "D"

Part VI of the Complaint

VI

FACTUAL ALLEGATIONS PERTAINING TO THE CLAIMS OF PLAINTIFFS A.W.R.O. AND BODDIE

A. (1) Plaintiff, Albany Welfare Rights Organization, hereinafter A.W.R.O., is an unincorporated association with a principal office located at 13 Trinity Place, Albany, New York, whose members are welfare recipients receiving public assistance from the State of New York. Plaintiff, Mrs. Catherine Boddie, is the president of A.W.R.O. and chairwoman of the New York State Welfare Rights Organization. Albany Welfare Rights Organization is a member of the New York State Welfare Rights Organization.

The general purpose of the Albany Welfare Rights Organization, A.W.R.O., is to promote the interests of all welfare recipients in the County of Albany which it seeks to accomplish by educating individual recipients in an effort to eliminate inequities and abuses in the administration of the welfare system.

One of the effective tools that A.W.R.O. has used in the past in servicing their membership is to get together and discuss individual problems with the County Welfare Department as a group. By going to the County Welfare Department as an integral group they were able to redress their grievances directly with the Commissioner and Deputy Commissioner of the Albany County Welfare Department. It was an effective tool of teaching others about their rights, obtaining a meaningful dialogue and redress of grievances. Furthermore, while at the County Welfare Department, A.W.R.O. was able to inform others about their organization.

Appendix "D"—Part VI of the Complaint

The New York State Department of Social Services encouraged this "open door policy" with the local county commissioners of social services in a directive dated November 2, 1970, which was sent to all county commissioners of Social Services. The directive stated that such meetings would serve a useful purpose since such meetings would permit the review of state policies and the application of these policies to the recipients in each local social services district.

A.W.R.O. as a group from approximately June, 1970 until the end of January, 1971, met with the Deputy Commissioner of Social Services, Anthony Jay, in order to resolve problems relating to denial of benefits, complaints about caseworkers and supervisors. Usually, each Monday after the regular A.W.R.O. meeting, a delegation of representatives would meet with Deputy Commissioner Jay since the Commissioner was usually not available to resolve these problems.

However, after a very fruitful and cordial relationship between A.W.R.O. and the Deputy Commissioner had developed from June, 1970, seven months, defendant Schreck sent a letter to A.W.R.O. on December 8, 1970. Defendant Schreck directed that in the future prior written agendas must be set up and that only six representatives could meet with Albany County Social Services Department and that the meetings would be only once a month.

Nevertheless, A.W.R.O. continued to meet with the Deputy Commissioner each Monday as they previously had arranged.

On Monday, January 11, 1971, A.W.R.O. arrived at the Albany County Department of Social Services to meet

with Deputy Commissioner Jay but were instead greeted by administrative officials of the Department who told the group to leave. The Deputy Sheriff who is assigned to guard and police the Department then ordered the group to leave, and A.W.R.O. promptly left the premises.

On Wednesday, January 13, 1971, A.W.R.O. returned to the Department and met with the Deputy Commissioner, since defendant Schreck was, as usual, not available. It was then mutually agreed upon by A.W.R.O. and Deputy Commissioner Jay to meet every first and third Mondays with him and available department personnel. A meeting for February 1st was also set up where defendants Pipentacos and Lance would be present so that A.W.R.O. could then discuss with them some of the grievances they had. A.W.R.O. had received specific complaints from numerous welfare recipients regarding these two Albany County employees, defendants Pipentacos and Lance.

On January 22, 1971, defendant Schreck again communicated with A.W.R.O. and informed the group via plaintiff Boddie that unless meetings were arranged "in advance, in writing that failure to do so would result in no further meetings."

On January 27, 1971, A.W.R.O. submitted a partial agenda for the February 1, 1971 meeting to Deputy Commissioner Jay. In the letter a request was made that if defendant Schreck was feeling better A.W.R.O. hoped he would be able to attend the meeting also.

Defendant Jay replied on January 29, 1971 to A.W.R.O. and cancelled the February 1, 1971 meeting and informed A.W.R.O. that future communications should be addressed to defendant Schreck.

Appendix "D"—Part VI of the Complaint

A.W.R.O., abandoning all hopes of redressing their grievances with the Department because of the cancellation of the February 1, 1971 meeting, proceeded to start an investigation on their own in order to see how widespread the abuses of defendants Pipentacos and Lance were.

On March 12, 1971, A.W.R.O. again, in a letter addressed to defendant Schreck, requested a meeting with defendants Pipentacos and Lance and the Commissioner in order to discuss their grievances pertaining to arbitrary and capricious denial of benefits and the specific complaints that members of A.W.R.O. had against defendants Pipentacos and Lance. A.W.R.O. requested an answer to their letter by March 20th, 1971.

Defendant Schreck on March 22, 1971 answered the letter and asked A.W.R.O. to submit their complaints in writing so that the Department could examine them. A.W.R.O. submitted the complaints in writing on March 31, 1971. A copy of the letter was also sent to defendants Wyman, Schreck, Pipentacos and Lance, among others. A.W.R.O. also requested a meeting on their grievances for April 12, 1971.

On April 8, 1971 defendant Jay informed A.W.R.O. that the matter would be investigated and that there was no purpose in meeting.

On April 15, 1971 a group of eight A.W.R.O. welfare members, one infant, a representative from the Legal Aid Society of Albany, two representatives from the Albany League of Women Voters and a social worker went to the Albany County Department of Social Services in order to meet with defendant Schreck and Jay concerning their grievances as stated in the written complaints filed with

the Department two weeks before on March 31, 1971. But instead of meeting with the representatives of A.W.R.O. the Department summoned nine Albany County Deputy Sheriffs to the Department who ordered A.W.R.O. and friends of A.W.R.O. to leave the premises immediately. A.W.R.O. left peaceably.

On April 15, 1971 defendant Jay sent a letter to A.W.R.O. informing plaintiff Boddie that the Department found no merit in the complaints after conducting an investigation by discussing the matter with defendants Pipentacos and Lance. Defendant Jay then stated that there was no reason for a meeting.

A.W.R.O. attempted on two other occasions during the remainder of April, 1971 to meet with the defendants Schreck, Jay, Lance and Pipentacos but on each occasion members of the Albany City Police Department were summoned to order A.W.R.O. to leave the Department's premises after being called by the County Attorney John Clyne. A.W.R.O. on each occasion left peaceably, without incident.

On May 6, 1971 in a further attempt to seek redress of grievances against the Albany County Department of Social Services, A.W.R.O. sent letters to defendants Wyman, The Albany County Civil Services Department, The New York State Civil Service Department and the New York State Division of Human Rights to meet with A.W.R.O. on May 10, 1971. The State Department of Civil Service and the State Human Rights Commission stated they had no jurisdiction. Defendant Wyman referred the matter to another state social services official, who never responded. The Albany County Civil Service Commission never responded. No one except A.W.R.O. attended the May 10, 1971 meeting to hear A.W.R.O.'s grievances.

Appendix "D"—Part VI of the Complaint

(2) Since approximately two years ago, plaintiff A.W.R.O. has attempted to peacefully conduct organizing activities and distribute literature in the public areas, including the waiting room, of the Albany County Department of Social Services.

On July 15, 1969, A.W.R.O. with other Welfare Rights organizations in the New York State met with defendant Wyman in order to clarify the policy of the New York Department of Social Services regarding the rights of organized welfare recipients to peacefully speak, associate, assemble, organize, and petition their government for redress of grievances, pursuant to the First Amendment. Defendant Wyman stated the policy of his department in a letter dated July 28 1969, in which he informed A.W.R.O. that it was illegal to distribute Welfare rights literature in the County Welfare Department because it would interfere with and breach the confidential relationship between social service agencies and applicants and recipients. In addition, he stated that it would interfere with the health and safety of public employees and members of the public they served.

On or about June 1970, defendant Wyman modified his policy with regard to the activities of welfare rights organizations in New York State. Upon information and belief, it is now and has been since about June 1970, the policy of the New York State Department of Social Services to permit local welfare commissioners absolute discretion to allow or refuse local welfare rights organizations to exercise First Amendment rights in the waiting rooms or public areas of local social services departments.

Appendix "D"—Part VI of the Complaint

Upon information and belief, since about June 1970, the New York City Department of Social Services has been permitted by defendant Wyman to allow welfare rights groups in New York City to staff informational booths equipped with telephones, to disseminate welfare rights information, to organize welfare recipients, to counsel recipients and seek redress of grievances.

At all times hereinafter mentioned, A.W.R.O. has demanded defendants Schreck and Wyman permission to engage in the same activities as the New York City welfare rights groups are permitted. Defendants Schreck and Wyman have failed and refused to comply with A.W.R.O.'s demands, and they continue to do so.

At substantially all the times hereinafter mentioned, plaintiff Boddie demanded, or attempted to exercise, as an individual, the same rights A.W.R.O. demanded, or attempted to exercise as a group. Plaintiff Boddies' said demands were denied and continue to be denied by defendants Schreck and Wyman.

B. (1) Plaintiff Boddie was the leader of A.W.R.O. at all times hereinabove mentioned, and was present at the office of the Albany County Department of Social Services at substantially each and every time A.W.R.O. met with defendant Jay, or attempted to meet with one or more of the defendants, or attempted to gain access to the waiting room of the Albany County Social Services office for the purpose of disseminating information.

(2) Substantially, all the fair hearings in Albany County were had at the specific instance or request of A.W.R.O. or of one or more of its members. Upon information and belief, before A.W.R.O. became active there were no fair hearings in Albany County.

APPENDIX "E"

Statutes and Regulations of the United States and the State of New York

Statutes of the United States

42 U.S.C., section 602(a)(9)

"§ 602. State plans for aid and services to needy families with children: contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

* * *

(9) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children:

* * *"

1973 Pocket Part, page 106

Regulations of the Department of Health, Education and Welfare 45 Code of Federal Regulations, section 205.50

"§ 205.50 SAFEGUARDING INFORMATION.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI, or XIX of the Social Security Act, except as provided in paragraph (b) of this section, must provide that:

(1) Pursuant to State statute which imposes legal sanctions:

(i) The use or disclosure of information concerning applicants and recipients will be limited to purposes directly connected with the administration of the program. Such purposes include establishing eligibity, determining amount of assistance, and providing services for applicants and recipients.

(ii) The State agency has authority to implement and enforce the provisions for safeguarding information about applicants and recipients;

(iii) Publication of lists or names of applicants and recipients will be prohibited.

(2) The agency will have clearly defined criteria which govern the types of information that are safeguarded and the conditions under which such information may be released or used. Under this requirement:

(i) Types of information to be safeguarded include but are not limited to:

(*a*) The names and addresses of applicants and recipients and amounts of assistance provided (unless excepted under paragraph (b) of this section);

(*b*) Information related to the social and economic conditions or circumstances of a particular individual;

(*c*) Agency evaluation of information about a particular individual;

(*d*) Medical data, including diagnosis and past history of disease or disability, concerning a particular individual.

(ii) The release or use of information concerning individuals applying for or receiving financial or medical assistance is restricted to persons or agency representatives who are subject to standards of confidentiality which are comparable to those of the agency administering the financial and medical assistance programs.

(iii) The family or individual is informed whenever possible of a request for information from an outside source, and permission is obtained to meet the request. In an emergency situation when the individual's consent for the release of information cannot be obtained, he will be notified immediately thereafter.

(iv) In the event of the issuance of a subpoena for the case record or for any agency representative to testify concerning an applicant or recipient, the court's attention is called, through proper channels to the statutory provisions and the policies or rules and regulations against disclosure of information.

(v) The same policies are applied to requests for information from a governmental authority, the courts, or a law enforcement official as from any other outside source.

(3) The agency will publicize provisions governing the confidential nature of information about applicants and recipients, including the legal sanctions imposed for improper disclosure and use, and will make such provisions available to applicants and recipients and to other persons and agencies to whom information is disclosed.

(4) All materials sent or distributed to applicants, recipients, or medical vendors, including material enclosed in envelopes containing checks, will be limited to those which are directly related to the administration of the program and will not have political implications. Under this requirement:

(i) Specifically excluded from mailing or distribution are materials such as "holiday" greetings, general public announcements, voting information, alien registration notices;

(ii) Not prohibited from such mailing or distribution are materials in the immediate interest of the health and welfare of applicants and recipients, such as announcements of free medical examinations, availability of surplus food, and consumer protection information;

(iii) Only the names of persons directly connected with the administration of the program are contained in material sent or distributed to applicants, recipients, and vendors, and such persons are identified only in their official capacity with the State or local agency.

(b) *Exception.* In respect to a State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act, exception to the requirements of paragraph (a) of this section may be made by reason of the enactment or enforcement of State legislation, prescribing any conditions under which public access may be had to records of the disbursement of funds or payments under such titles within the State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes."

36 *Federal Register*, 3860, February 27, 1971.*

Statutes of the State of New York

Social Services Law, section 136

§ 136. PROTECTION OF PUBLIC WELFARE RECORDS

"1. The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the

* On August 16, 1973, the Department of Health, Education and Welfare published a proposed revision of section 205.50 which has not been promulgated as yet (38 *Federal Register*, pp. 22141, 22142).

county, city or town, to a person or agency considered entitled to such information. However, if a bona fide news disseminating firm or organization makes a written request to the social services official or the appropriating board or body of a county, city or town to allow inspection by an authorized representative of such firm or organization of the books and records of the disbursements made by such county, city or town for public assistance and care, such requests shall be granted within five days and such firm or organization shall be considered entitled to the information contained in such books and records, provided such firm or organization shall give assurances in writing that it will not publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for the recipients of public assistance and care except as expressly permitted by subdivision four. If such firm or organization shall, after giving such assurance, publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for or recipients of public assistance and care except as expressly permitted by subdivision four, then such firm or organization shall be deemed to have violated this section and such violation shall constitute a misdemeanor. As used herein a news disseminating firm or organization shall mean and include: a newspaper; a newspaper service association or agency; a magazine; a radio or television station or system; a motion picture news agency.

"2. All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section shall be disclosed only to the commissioner of social services, or his authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in

and for such county, city or town or its authorized representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information.

"3. Nothing in this section shall be construed to prevent registration in a central index or social service exchange for the purpose of preventing duplication and of coordinating the work of public and private agencies.

"4. No person or agency shall solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, any information relating to any applicant for or recipient of public assistance or care for commercial or political purposes. Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care, including the names and addresses of such applicants or recipients who are charged with the commission of such crimes or offenses."

Regulations of the New York State Department of Social Services

Volume 18, Official Compilation, Codes, Rules and Regulations of the State of New York, part 357

"PART 357

CONFIDENTIAL NATURE OF RECORDS

"SECTION 357.1 *Nature of information to be safeguarded.* Information to be safeguarded includes names and addresses of applicants, recipients, and their relatives, including lists thereof; information

contained in applications and correspondence; reports of investigations; reports of medical examination and treatment; resource information; financial statements; and record of agency evaluations of such information. This applies to all information secured by the agency whether or not it is contained in the written record.

"357.2 *Prohibition against disclosure of information.* (a) Officers and employees of public welfare agencies shall not reveal information obtained in the course of administering public assistance for purposes other than those directly connected with the administration of public welfare, except for the name, address and the amount received by or expended for a recipient of public assistance when the appropriating body or public welfare official, has authorized their disclosure to an agency or person deemed entitled to it pursuant to section 136 of the Social Welfare Law.

(b) Each public welfare official shall designate the person, or persons, within the agency with authority to disclose information.

"357.3 *Basis for disclosure of information.* (a) *Safeguards in disclosing information.* Information shall be released to another agency or person only when the public welfare official providing such data is assured that:

(1) the confidential character of the information will be maintained;

(2) the information will be used for the purposes for which it is made available, such purposes to be reasonably related to the purposes of the public welfare program and the functioning of the inquiring agency;

(3) the information will not be used for commercial or political purposes.

(b) *Disclosure of medical information.* The medical information supplied directly by a physician, den-

tist, or nurse, as well as hospital or clinic reports shall be considered a confidential communication and shall be released to another agency only with the specific consent of the patient if competent.

(c) *Disclosure to applicant, recipient, or person acting in his behalf.* (1) The case record shall not ordinarily be made available for examination by the applicant or recipient, since it contains information secured from outside sources. However, particular extracts shall be furnished him, or furnished to a person whom he designates, when the provision of such information would be beneficial to him. The case record, or any part of it, admitted as evidence in the hearing of an appeal shall be open to him and his representative.

(2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested.

(d) *Disclosure to relatives.* The duty of the agency to investigate the ability and willingness of relatives to contribute support imposed by section 132 of the Social Welfare Law and the liability of legally responsible relatives for support imports that the agency may inform them of the basic circumstances of the applicant's needs insofar as may be necessary and in a discussion looking to a contribution of support, of the amount of the applicant's needs and income. Such a relative is a 'person . . . considered entitled to such information.' (See *Social Welfare Law*, § 136, subd. 2.).

(e) *Disclosure to federal, State or local official.* (1) Information may be disclosed to any properly constituted authority. This includes a legislative body or committee upon proper legislative order, an admin-

istrative board charged with investigating or appraising the operation of public welfare, law enforcement officers, grand juries, probation and parole officers, government auditors, and members of public welfare boards, as well as the administrative staff of public welfare agencies.

(2) Information may be released to a selective service board when such information is necessary in order that the board may arrive at a valid and consistent decision regarding dependency.

(f) *Disclosure upon subpoena by court.* (1) When a public assistance record is subpoenaed by court the public welfare agency shall immediately consult its legal counsel before producing any record or revealing any information or giving any testimony.

(2) When the subpoena is for a purpose directly related to the administration of public assistance or protection of the child, the agency before complying with the subpoena shall endeavor to get in touch with the client whose record is involved or his attorney and secure permission to reveal the contents of the record which relate to the administration of public assistance.

(3) In the event that the subpoena is for a purpose not directly related to the administration of public assistance or the protection of a child, the agency shall plead, in support of its request to withhold information, that the Social Security Act, the Social Welfare Law and the regulations of the State Department of Social Welfare prohibit disclosure of confidential information contained in records and files, including names of clients. The agency will be governed by the final order of the court after this plea is made.

(g) *Disclosure to bona fide news disseminating firm.* The written assurance required by section 136 [of the Social Welfare Law] that the names and ad-

dresses of applicants and recipients of assistance shall not be published shall be obtained by the public welfare official before allowing examination of records of disbursements by that bona fide news disseminating firm.

"357.4 *Prohibition against improper use of lists of applicants and recipients.* All material sent to applicants and recipients of public assistance, including material enclosed in envelopes containing checks, must be directly related to the administration of the public assistance programs and shall not have political implications."

Supreme Court, U. S.
FILED
JUL 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1862

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York,

Petitioner,

—v.—

ALBANY WELFARE RIGHTS ORGANIZATION and CATHERINE BODDIE, Individually and on behalf of her minor children and all other persons similarly situated,

Respondents,

and

FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services; GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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—v.—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Northern District of New York (Foley, C.J.) dismissing respondents' complaint has not been officially reported. It is reproduced in Appendix A to the Petition at pp. 24-35. The opinion of the Court of Appeals for the Second Circuit reversing the dismissal of respondents' complaint and remanding the case for further proceedings is reported at 493 F.2d 1319 and is reproduced in Appendix B to the Petition at pp. 36-48.

Jurisdiction

Jurisdiction is adequately set forth in the Petition.

How the Federal Questions Were Raised

The federal questions were raised by respondents in the complaint in the District Court for the Northern District of New York and on appeal to the Court of Appeals for the Second Circuit.

Questions Presented

1. Is the promulgation of a policy by the New York State Department of Social Services allowing local welfare commissioners absolute discretion to permit or prohibit the exercise of First Amendment rights inside local welfare centers sufficient state action to give the federal courts jurisdiction over the action as a whole or the State Commissioner under 42 U.S.C. Section 1983?

2. May state officials totally prohibit a welfare rights organization from engaging in the orderly and non-disruptive distribution of welfare rights information to welfare recipients in the public waiting room of a welfare center?

Statement of the Case

This civil rights action concerns a regulation promulgated by officials of the Department of Social Services (welfare department) of Albany County, New York, and affirmatively permitted by Petitioner, the State Commissioner of Social Services. The regulation prohibits members of the Albany Welfare Rights Organization (AWRO) from entering the public waiting areas of the Albany welfare center to talk to and distribute educational and informational leaflets to welfare recipients concerning their legal rights regarding welfare.

AWRO is a local chapter of the Upstate New York Affiliate of the National Welfare Rights Organization, which has some 150,000 members in approximately 850 local organizations throughout all fifty states (T. 152*). At the time of the hearing in District Court, AWRO had approximately 400 members (T. 153). The organization's purpose is educational and political. It seeks to inform welfare recipients of their legal rights, to train them to help other welfare recipients in their dealings with the welfare department, and to organize them to exert political pressure on behalf of poor people in local, state, and federal government.

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* The letter "T" stands for the transcript of the hearing on respondents' motion for a preliminary injunction held on July 26-27, 1972, in the District Court.

The Albany County Welfare Department is located in a five-story building in the City of Albany, New York. All the work of the department employees that involves personal contact with welfare recipients is carried out on the first and third floors (T. 244), and there are waiting areas on those floors for recipients who come to the center. The welfare department has approximately 400 employees (T. 199).

The work areas of the first and third floors of the welfare department are separated from the corridors and from the public waiting areas by partitions which reach almost to the ceiling. All county business is carried out behind these partitions (T. 205).

Benches are provided in waiting areas for people to sit on, but frequently there is not enough room and people must stand up along the walls and sit on the stairs (T. 66, 95). The waiting people talk together. Children waiting with their mothers run around and play together. Babies cry (and often so do adults) (T. 96).

Every few minutes a welfare department employee comes to the front of the waiting area and shouts out the address of a waiting recipient (rather than the name to preserve anonymity) and that person then enters the work area through a door to see a caseworker (T. 122). Often caseworkers instead come into the waiting area and discuss a client's problem there in public (T. 71, 99).

In short, waiting areas in the welfare department are not quiet sanctuaries. On the contrary, they are noisy, crowded and chaotic and are well-separated from the areas where county business is conducted.

As of May 31, 1972 the welfare department had 6600 cases involving some 20,000 persons. On any given day between 200 and 250 welfare recipients come to the welfare center concerning public assistance alone and excluding those who come for food stamps and medicaid (T. 200). Each of these persons waits an average of an hour and a half before his case is called (T. 72).

At the end of 1969, members of AWRO began to go to the welfare center each week to meet with welfare officials and to distribute leaflets to waiting welfare recipients. This activity was permitted by Albany County welfare officials (T. 123).

The weekly leafleting went on for approximately six months during which time AWRO membership grew by an average of four members a week (T. 78). In mid-1970, however, a new local welfare commissioner changed the old policy and AWRO members were told they could no longer pass out their leaflets inside the welfare center (T. 113). AWRO next attempted to pass out their leaflets and talk to people in the street as they entered and left the welfare center (T. 127). This proved to be unsatisfactory because of the extreme heat, and wind and dirt from nearby construction (T. 132-34, 189); because people entering and leaving the building had other business to attend to, while inside the center they had nothing to do but wait (T. 134); and because welfare recipients often did not want to be identified as such by standing in the public street and discussing their problems with persons identified by buttons as AWRO representatives (T. 190, 193-194).

AWRO also tried to reach welfare recipients in other places. One organizing effort was made in the public housing projects where many welfare recipients live. This

effort, too, proved unsuccessful because, as one witness testified, " . . . People just don't want to open their doors to you any more, for obvious reasons, and they are just not all welfare people that live in the projects. You can't walk up to anyone and say, 'Are you on welfare?' " (T. 161).

During this time AWRO also attempted to place its information on a bulletin board in one of the waiting areas of the welfare center but department officials took it down, declaring that the board was for the use of county employees only (T. 90-91, 179, 192-93).

Welfare recipients are entitled by law to be accompanied by another person of their choosing any time they have dealings with the welfare department. AWRO tried to supply representatives to go individually with welfare recipients to the department, but they rarely had enough trained people available to help all who asked (T. 173).

At the District Court hearing, no evidence was produced to show that during the six months AWRO leafleted in the welfare center any disruption whatsoever was caused by their activities. On the contrary, testimony proved that leafleting was carried on only in public areas of the building which were well-separated from areas where county business was carried out (T. 202); that the public waiting areas were already chaotic; that AWRO did not attempt to force its literature on anyone who did not want it (T. 140, 148, 181, 216); that most people did want it (T. 34-35, 63); that AWRO made every attempt not to litter and to clean up after their visits (T. 111, 168); and that the noise and disruption level was not raised by the presence of AWRO (T. 140, 145-46).

The District Court for the Northern District of New York (Foley, C.J.) denied respondents' motion for a pre-

liminary injunction and dismissed the complaint, holding that two or three persons distributing leaflets inside the welfare center would be disruptive. The Court of Appeals, in an opinion by Judge Gurfein, reversed, holding that welfare officials could not totally prohibit non-disruptive free speech activities in a public waiting-room and remanded the case for a determination of how many persons more than one should be permitted to leaflet in the Albany County welfare center's waiting-room.

REASONS FOR DENYING CERTIORARI

I.

The Question of Jurisdiction Over Petitioner Is Immaterial to the Result in This Case

Respondents confess some confusion as to petitioner's jurisdictional arguments. Petitioner appears to be saying that the courts below had no jurisdiction over this case because no state action was alleged in the complaint. Apparently, petitioner believes that the phrase "state action" means action by an official of one of the states, as opposed to action by an official of a municipality (in this case Albany County welfare officials who were also defendants and appellees in this action in the courts below). Petitioner argues that he, a New York State official, took no action concerning the exercise of First Amendment rights in the Albany County welfare center, and therefore, even though local officials did take such action, there is no "state action."

This argument is clearly incorrect. "State action" within the meaning of 42 U.S.C. Section 1983 refers to action by any public official, municipal as well as state. *Monroe* v. *Pape,* 365 U.S. 167 (1961). Therefore, the federal courts

have jurisdiction in this case over acts of the Albany County welfare officials as well as over petitioner.

Also without merit is petitioner's next argument, that even if the courts below did have jurisdiction over local officials, they had none over him as State Commissioner of Social Services, because he had taken no "action" with respect to the exercise of free speech activities in welfare centers, but simply left total discretion to local officials to permit or prohibit such activities. Petitioner argues that this is insufficient "action" on his part to constitute "state action" within the meaning of 42 U.S.C. §1983.

When the Court of Appeals used the phrase "permissive order," however, it referred precisely to petitioner's policy of permitting local officials to exercise their own discretion. Petitioner is directly in charge of the entire state welfare system. He is responsible by law for the actions of local welfare officials. When he, by affirmative policy, allows local officials to act in an unconstitutional manner while having the power to stop them from doing so, his choice to refrain from exercising his power constitutes state action. *Adickes* v. *Kress and Co.*, 398 U.S. 144 (1969);* *Reitman* v. *Mu'key*, 387 U.S. 369 (1957); *Wright* v. *McMann*, 387 F.2d 519 (2nd Cir. 1967).

In the context of this case, however, this point is purely theoretical, for the ruling of the Court of Appeals is against the county officials who adopted and enforced the challenged regulation, as well as against petitioner. These officials have not petitioned for certiorari, and are acting at present

* Although petitioners cite *Adickes* in their favor, the very quote they use explicitly states that mere "custom or usage" can be the basis for a finding of state action and thus an affirmative policy by a state official clearly constitutes state action. See Petition, pp. 12-13.

in partial compliance with the Court of Appeals' ruling.* A decision by this Court, if certiorari is granted, that the federal courts had no jurisdiction over petitioner would not change the ruling of the Court of Appeals as applied to the county officials who are in immediate control over free speech activities in the Albany County welfare center. Such a decision by this Court would therefore be a nullity as regards this case.

II.

The Decision of the Second Circuit Was Clearly Correct

The Second Circuit's unanimous decision that a total prohibition against peaceful, non-disruptive free speech activities by a welfare rights organization inside a welfare center violated the First Amendment is in accordance with well-established law laid down by this Court and by other federal courts.

Peaceful leafleting is a form of communication that is protected by the First Amendment. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *Martin* v. *Struthers,* 319 U.S. 141 (1943); *Schneider* v. *State,* 308 U.S. 147 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

Therefore, although the state may, of course, promulgate reasonable regulations governing the time, place and manner in which it is carried out, leafleting may not be entirely prohibited in any public place, absent a showing

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* Counsel for respondents have been informed that AWRO has been permitted to set up a table manned by two persons in the welfare center at which information is handed out and questions answered.

that it causes the material and substantial disruption of a function in which the state has a compelling interest, *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). Mere fear of disruption is not sufficient to justify prohibition of the exercise of free speech activities. *Tinker* v. *Des Moines Independent School District, supra; Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D.R.I. 1971).

In upholding the right of persons to engage in free speech activities in a number of places including the public streets (*Thornhill* v. *Alabama*, 310 U.S. 88 (1940)); bus terminals (*Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir. (1968), *cert. den.* 393 U.S. 940 (1968)); shopping centers (*Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) as interpreted by the majority in *Lloyd Corp., Inc.* v. *Tanner*, 407 U.S. 551 (1972)); public schools (*Tinker* v. *Des Moines Independent Community School District, supra*); unemployment offices (*Unemployed Workers Union* v. *Hackett, supra*); and Welfare Centers (*Massachusetts Welfare Rights Organization* v. *Ott*, 421 F.2d 525 (1st Cir. 1969)), courts have established several criteria for determining the degree to which free speech activities may be circumscribed in a given place. These criteria include a) the nature of the place—whether "the primary activity for which it is designed is attended with . . . less than perfect order," *Wolin* v. *Port of New York Authority, supra* at 90; b) the nature of the free speech activity—whether, as here, it involves the "pure speech" activity of conversing and distributing leaflets or whether it involves a greater degree of "conduct" such as carrying picket signs and chanting slogans. *Cox* v. *Louisiana, supra;* c) the relationship of the communication to the purpose of the place—whether the place is one "where

the audience appropriate to the content of the communication may be found." *Wolin* v. *Port of New York Authority, supra* at 90; *Unemployed Workers Union* v. *Hackett, supra,* at 1386, or whether the place is the subject of the communication. Compare, *Amalgamated Food Employees Union* v. *Logan Valley Plaza, supra* with *Lloyd Corp.* v. *Tanner, supra.*

Respondents seek to engage only in "pure speech," which is directly connected both with the place and the audience in question. In the words of the Court of Appeals, "[i]t is in the light of [this] modest request [. . .] that we must consider whether the waiting room of a welfare office is an appropriate place for the exercise of these constitutional rights." (Appendix B to Petition, p. 45).

The Court of Appeals' conclusion that a welfare office waiting room is an appropriate place for the distribution of welfare rights information is clearly correct.

Applying the criteria outlined above, five federal courts prior to the Second Circuit issued opinions (two of which have been affirmed by this Court*) finding welfare and un-

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* Petitioner argues that the affirmance by this Court of *LeClair* v. *O'Neil*, 307 F. Supp. 621 (D. Mass. 1969), and *Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969), was based solely on the grounds that "Federal courts should abstain from interfering with the enforcement of state law" (Petition, p. 15). Petitioner draws this conclusion from the fact that in its summary affirmance of *LeClair* (a case in which the federal court refused to enjoin prosecutions under a state trespass statute against persons who had set up an information table in a welfare center where the table itself had obstructed the flow of traffic) this Court cited *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell* and *Fernandez* v. *Mackell*, 401 U.S. 66 (1971). Petitioner assumes that this same reasoning must have been the basis of this Court's affirmance in *Hurley* v. *Hinckley, supra.* This assumption is false. This Court's holding in *Younger* v. *Harris, supra* was not that federal courts

employment office waiting rooms to be appropriate places for the exercise of relevant and non-disruptive First Amendment activities. *Hurley* v. *Hinckley,* 304 F. Supp. 704, 712 (D. Mass. 1969), *aff'd summarily sub nom., Doyle* v. *O'Brien, Chief of Police of Somerville,* 396 U.S. 277 (1970); *LeClair* v. *O'Neil,* 307 F. Supp. 621 (D. Mass. 1969), *summarily aff'd* 401 U.S. 984 (1971); *Massachusetts Welfare Rights Organization* v. *Ott, supra; Unemployed Workers Union* v. *Hackett, supra; Indiana Consumers and Workers et al.* v. *Swaim,* Civ. No. 72F5 (D.C. Ind. July 12, 1972) (unreported; the decision is annexed hereto in the appendix).

Petitioners argue that welfare recipients have the right to be protected from the invasion of their privacy by persons seeking to inform them of their legal rights. The Court of Appeals, however, "[did] not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights." (Appendix B to Petition p. 47). This reasoning, too, is clearly correct, and in accordance with applicable decisions of this Court.

The record in the court below clearly shows that there is no privacy whatsoever in the welfare center, even without leafleting. Not only is it obvious by a person's presence in the center that he or she is on welfare or is seeking assistance, but frequently case workers discuss recipients'

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should "abstain from interfering with the enforcement of state law," but that they should not enjoin pending state criminal prosecutions. In one of the companion cases making up *Hurley* v. *Hinckley, supra,* however, there was no pending state prosecution, but only threat of one should the plaintiff continue to distribute leaflets in the welfare center, and thus this Court's affirmance can only be of the holding of the Massachusetts District Court that the Massachusetts trespass statute was not aimed at preventing the peaceful distribution of leaflets in a welfare center waiting room and its dictum that the First Amendment guarantees of speech and petition protect these activities.

cases with them in the public waiting room (T. 71, 99). Indeed, it is largely concern for recipients' privacy that makes AWRO members prefer to carry on their activities inside the center rather than in the street.

The law is well-established that a person's right to privacy is greatly diminished when he ventures out of his own house and into a public or quasi-public arena. In the words of this Court in *Public Utilities Comm.* v. *Pollack*, 343 U.S. 451, 469 (1951) (holding that non-commercial broadcasting on public buses did not invade passengers' constitutional rights).

> "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

Organization for a Better Austin v. *Keefe, supra*, further supports the proposition that when the right to distribute leaflets comes into conflict with a right of privacy, a blanket prohibition against leafleting is not justified.

The recent decision of this Court in *Lehman* v. *City of Shaker Heights*, —— U.S. ——, 42 U.S.L.W. 5116 (June 25, 1974) is not to the contrary. There, in a closely divided decision, in which there was no majority opinion, four justices recognized that many factors go into the decision whether a particular forum is an appropriate one for free speech activities. In particular, the Court considered the nature of the forum. It distinguished the public buses, on which plaintiffs sought to affix placards, from other areas more traditionally associated with the exercise of First Amendment rights on the grounds that on the buses there were "no open spaces, no meeting hall, park, street

corner or other public thoroughfare," 42 U.S.L.W. at 5117. The public waiting room of the Albany County welfare center, however, does have open space and is far more similar to a meeting hall and a public thoroughfare than is a bus. Thus, it falls into the category of those public places in which free speech activities must be permitted.*

The *Lehman* case can be distinguished from the case at bar still further, First, in *Lehman,* the communications which were sought to be placed in public vehicles were not specifically related to either the place or the audience, and because the means of communication were signs affixed to the walls of the bus, which were impossible to "turn off", whereas here they are leaflets which can easily be ignored.

The Second Circuit specifically stated that its holding would not permit a welfare recipient to be "badgered to the point of being made a captive." No allegations have been made, however, that such badgering has ever taken place. Welfare recipients have only to shake their heads to be rid of the proffered communication. Considerable testimony at the hearing below proved that plaintiffs' non-aggressive, non-coercive offering of printed and verbal information and advice did not constitute an intolerable invasion of privacy. Absent coercion it is clear that expression may not be stifled because it may be offensive to the audience. *Terminiello* v. *City of Chicago,* 337 U.S. 1 (1948); *Cox* v. *Louisiana, supra; Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

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* If the critical question is whether the facility has the attributes of a "meeting place for discussion", see *Lehman, supra,* 42 U.S.L.W. 5118 (concurring opinion of Mr. Justice Douglas), it is clear that a public waiting room in a welfare center, where people meet each other and converse on welfare problems while they are waiting to be served, is much more a "meeting place for discussion" facility, than is a public conveyance.

In fact, the evidence is most persuasive that the majority of persons waiting in the welfare center wished to receive the proffered information and that petitioner wished to prevent them from doing so. But in any case, those who did not want the information had only to refuse it. The First Amendment protects the right to receive as well as to disseminate information. See *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). The fact that some people might not want a leaflet is not a Constitutional reason for prohibiting others from having access to it.

CONCLUSION

Petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Memorandum of Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

FORT WAYNE DIVISION

Civil No. 72 F 5

INDIANA CONSUMERS AND WORKERS UNION, an unincorporated association, *et al.*,

Plaintiffs,

—v.—

KENNETH SWAIM, individually and in his capacity as Manager of the Fort Wayne Branch of the Indiana Employment Security Division, *et al.*,

Defendants.

The Indiana Consumers and Workers Union (hereinafter ICWU), an unincorporated association, and certain named plaintiffs, on behalf of themselves and as representatives of a class of all unemployed workers in Indiana, bring this action seeking injunctive and declaratory relief as authorized by 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202. Jurisdiction of this court is based on 28 U.S.C. §§1343(3) and 1343(4). This cause is presently before the court upon plaintiffs' application for a preliminary injunction restraining the defendants from refusing to allow

plaintiffs and members of the class they represent to enter the Fort Wayne Branch Office of the Indiana Employment Security Division (hereinafter IESD) during regular office hours to speak with other unemployed workers and to distribute their printed material. An evidentiary hearing was held before this court on April 27, 1972 in Fort Wayne, Indiana. This court has concluded that plaintiffs and members of the class they represent will suffer irreparable harm if a preliminary injunction is not issued in that plaintiffs will be denied their First Amendment rights to communicate effectively with other unemployed workers in this branch office of the IESD. This court further finds that plaintiffs have a probability of success on the merits, and a preliminary injunction is necessary to preserve plaintiffs' exercise of those First Amendment rights.

The ICWU is an association organized on or about January 13, 1972, whose stated aims and purposes are to make unemployed workers aware of their rights and benefits under the Indiana Employment Security Act, to make constructive changes in that Act, and to assist unemployed workers in enforcing these rights. The named individual plaintiffs were all members of the ICWU and were all unemployed at the time this action was filed. The court finds that there are common questions of law and fact affecting the rights of the plaintiffs and members of the class they represent and common relief is sought by all; that members of the class are so numerous as to make joinder of all members impossible; and that the interests of the class will be adequately represented by the named plaintiffs. This court therefore finds that this action may be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(3), and the class properly represented here are all unemployed workers in the State of Indiana.

The plaintiffs attack the policy of the named defendants, individually and in their capacity as directors, managers, and agents of the Indiana Employment Security Division, in prohibiting them from speaking with and distributing printed material to the unemployed workers in the IESD branch office. The branch office of the Indiana Employment Security Division located at 505 West Washington Boulevard, Fort Wayne, Indiana, is dedicated to public use and is the office where unemployed workers must report weekly to make themselves available for work and pick up their benefit checks.

Plaintiffs, at the outset of the evidentiary hearing, brought to the court's attention the defendants' failure to respond to plaintiffs' request for admissions filed on February 24, 1972 and served upon the defendants March 1, 1972. Plaintiffs ask this court to deem those requests admitted as provided in Fed. R. Civ. P. 36(a). Defendants argue in opposition to this request that they understood they had until April 26, 1972 to respond to those requests. On reviewing the file, however, it is clear that defendants were to respond to those requests by at least April 21, 1972. Moreover, even assuming the defendants had until April 26, 1972 to file those admissions, the admissions would not be timely inasmuch as defendants have yet, as of the date of this opinion, to respond to that request. Plaintiffs have made timely and good faith responses to all discovery sought by the defendants, while the defendants have not responded to one request by the plaintiffs, nor have they seen fit to file an answer in this cause. The court therefore holds that plaintiffs' requests for admissions filed February 24, 1972 are deemed admitted and conclusively binding on these defendants for the purposes of this action. (It should be noted, however, that the uncontroverted evidence

disclosed during the hearing in this matter conforms substantially to what plaintiffs had sought by way of admission.)

On January 24, 1972, at approximately 9:30 a.m., four members of the ICWU, Fred Olson, Cipriano Torres, Terry Giese, and Frederick Dey, entered the Fort Wayne branch of the IESD for the purpose of talking and distributing fliers to claimants waiting in the various lines. After talking and handing fliers to a few claimants, the plaintiffs were asked to leave immediately by defendant Bowman, an employee of the Indiana Employment Security Division. Mr. Bowman stated that he was acting pursuant to orders from the main office in Indianapolis, Indiana. Plaintiffs thereupon left immediately in a peaceful manner.

That afternoon, a letter was delivered to defendant Swaim, the manager of the Fort Wayne branch of the IESD, asking him to reconsider his position and allow plaintiffs to enter the lobby for the purpose of distributing fliers and talking to claimants. On the following day, January 25, 1972, and on January 26, 1972 at approximately the same time as on January 24, 1972, plaintiffs returned to the IESD office and the same events occurred, i.e., after talking to a few claimants, they were asked to leave and they did so peacefully.

On all three occasions listed above, the plaintiffs would enter the building and talk to claimants who were standing in one of the four lines waiting to be served by employees of the defendants. Plaintiffs at all times remained in the lobby or waiting room of the Fort Wayne branch; they created no disturbance and did not interfere in any way with the function of that office. They talked and gave fliers only to those claimants who consented.

There was evidence presented that when four lines are waiting to be served, the plaintiffs must go between the lines to talk to claimants, and this will force claimants who are leaving the front desk to step around one of the plaintiffs. However, this will occur only when four lines are waiting to be served, and the testimony indicates that four or five lines are present only during peak periods. Moreover, there was no evidence presented demonstrating that this slight inconvenience to a claimant would in any way interfere with the function of that office.

Because of the correlation between the physical size and design of the office in question and the degree of obstruction these plaintiffs' presence would have on that office, the court, with the consent of all parties, visited the Fort Wayne Branch Office of the IESD and made the following observations: The office has one public entrance located on Clay Street. There is an inclined hallway leading to the main claims office or waiting room. The hallway makes one right angle turn, and at its widest point is six feet ten inches, and five feet six inches at the narrowest point. The claims waiting area where plaintiffs wish to talk to claimants and pass out their fliers is a square room of approximately twenty-eight feet by twenty-eight feet, discounting a two-foot area on two sides of the room, which area is taken up by chairs along the outer walls of the room. Although at the time of this court's view of the premises, the office was virtually unoccupied, even upon visualization of the room with four lines of claimants, this court cannot see how plaintiffs limited activities would interfere with the function of that office.

Plaintiffs rely heavily upon *Unemployed Workers Union* v. *Hackett,* 332 F. Supp. 1372 (D.R.I. 1971) and cases cited therein for the proposition that their activities are permis-

sible and are protected by the First Amendment. The only factual differences between *Hackett, supra,* and the case before this court is the presence of a much larger room in Hackett[1] and the existence of three entrances in that case. This court agrees with much of what Judge Pettine said in the *Hackett* opinion, but, because of the somewhat differing factual context, a few observations are in order.

From the statement of aims and the information printed upon the fliers sought to be distributed by the ICWU, it is clear that they hope to assist other unemployment compensation recipients in understanding the system and to gain support in making what they believe would be improvements in that compensation system. Plaintiffs' activity in peacefully pamphleteering to gain those objectives is protected by the First Amendment. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971). *See also, Martin* v. *City of Struthers,* 319 U.S. 141 (1943); *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938). Moreover, as the court in *Hackett, supra,* noted, the right of these unemployed workers to associate to further their interests, albeit those interests are not clearly "political," is also protected activity under the First Amendment. *Hackett, supra* at 1376. *See generally United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967); *NAACP* v. *Button,* 371 U.S. 415 (1963).

Essential to a finding that plaintiffs' activities here in question are permissible is a conclusion that the IESD branch office is a "public forum" for the exercise of plaintiffs' limited activities. Public forums have been found to

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[1] The court in Hackett found the unemployment office there to be 20,000 square feet. However, from that opinion, it is unclear whether or not this was the total office space or only the claims waiting area.

exist for the exercise of restricted First Amendment activities in streets, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); in bus terminals, *Wolin* v. *Port of New York Authority,* 392 F.2d 83 (2d Cir. 1968), *cert. denied,* 393 U.S. 940 (1968); in shopping centers, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308 (1968); in welfare offices, *Welfare Rights Organization* v. *Ott,* 421 F.2d 525 (1st Cir. 1969); and to a very limited extent in the classroom, *Tinker* v. *Des Moines Independent School Community,* 393 U.S. 503 (1969).

The inquiry made by the court in *Wolin* v. *Port of New York Authority, supra,* in determining whether or not a bus terminal which also served as a public passageway was a public forum for the activity here in question, was as follows:

> Does the character of the place, the pattern of usual activity, the nature of its essential purpose, and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. *Wolin, supra* at 89.

This court finds the inquiry offered in *Wolin, supra,* to be somewhat broad in this context. The inquiry should be narrowed to ask not whether the standards offered in *Wolin, supra,* make the forum an appropriate place for the communication of views on issues of political and social significance in general, but whether or not those standards make it an appropriate forum for the type of communication presently under scrutiny. By "type" of communication, the court would include both the relevance of the substance of the communication to the function of the premises and the activity associated with that form of communication.

The character of the branch office in question here makes it the most appropriate forum for plaintiffs' attempted activities. Plaintiffs are attempting to educate unemployed workers regarding their rights under the Indiana Employment Security Act, and the most logical place to find and instruct those workers would be the Indiana Employment Security Division office. Moreover the activity associated with the form of communication here is peaceful pamphleteering, which is an appropriate form of communication for an office of the size and function here in question.

Although plaintiffs' activity is protected by the First Amendment and the IESD branch office is an appropriate public forum for these activities, the State, nevertheless, may regulate the exercise of those rights so as to prevent interference with the use to which the property is ordinarily put by the State. *See Amalgamated Food Employees, supra; Note, Regulation of Demonstrations,* 80 HARV. L. REV. 1773 (1967). The extent, if any, to which a state may regulate these rights turns basically upon a weighing process where the interests of the State in continuing the function of the IESD unhampered by interference must be considered. *See Cox* v. *Louisiana No. 24,* 379 U.S. 536, 554-5 (1965). This court recognizes that waiting rooms are not traditional fora for the exercise of First Amendment rights, and that a high degree of peace and order is necessary to their operation. Because of this recognition, the court closely examined the effect plaintiffs' pamphleteering and speaking to other claimants had on the operation of the office. Yet, from all the evidence adduced at the hearing, this court found plaintiffs' activity had a *de minimis* effect on those operations.

This court does not intend, however, to allow plaintiffs' exercise of those rights to remain completely unrestricted.

The size and nature of the forum here necessitates that certain precise and narrowly drawn restrictions be placed upon those rights, which restrictions shall be included in this court's preliminary injunctive order.

Therefore, this court finds that unless a preliminary injunction is granted, these plaintiffs and the class they represent will suffer irreparable harm in that they will be denied their right to communicate with their fellow workers effectively, as protected by the First Amendment and made applicable to the states through the Fourteenth Amendment to the United States Constitution.

The foregoing will constitute this court's findings of fact and conclusions of law as required by FED. R. CIV. P. 65(d) and 52(a).

PRELIMINARY INJUNCTION

For the above reasons it is hereby ordered:

Kenneth M. Swaim, individually and in his capacity as Manager of the Fort Wayne Branch of the Indiana Employment Security Division; William Bowman, individually and in his capacity as an employee at the Fort Wayne Branch of the Indiana Employment Security Division; John F. Coppes, individually and in his capacity as Director of the Indiana Employment Security Division; Van Smith, Max Wright, Albert Summers, Richard O. Ristine, and William H. Andrews, individually and in their capacities as members of the Indiana Employment Security Board; and all persons in active concert and participation with them are enjoined from refusing to allow plaintiffs and all other unemployed workers in Indiana to enter the Indiana Employment Security Division branch office at 505 West Washington Boulevard, Fort Wayne, Indiana, during regular business hours to speak with other unemployed workers

and to distribute literature or printed material in that area of the office known as the main waiting room or in the hallway leading up to the main waiting room. Provided, that plaintiffs and the class they represent will not place more than one member of their class in that office at any one time whose purpose is to distribute literature or speak with other claimants; that plaintiffs will discard properly or remove all printed material which they have distributed and which has been discarded by those to whom it was given; that plaintiffs or other members of their class, when so present in the above-mentioned office, will in some effective manner clearly designate themselves as not being agents, employees, or representatives of the Indiana Employment Security Division.

In the event a final judgment is in favor of the defendants, the injury to them by reason of the entry of a preliminary injunction will be minimal or nonexistent. Therefore no bond or security shall be required of the plaintiffs.

The motion for preliminary injunction is granted pending entry of a final judgment.

Entered this 18th day of May, 1972.

[Signature Illegible]

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United States District Judge